BLANK PAGE

SUPREME COURT. U. S.

Office-Supreme Court U.S.
FILED
OCT 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

THORMUND A. MILLER,
JEREMIAH C. WATERMAN,
205 Transportation Building,
17th and "H" Streets, N.W.,
Washington, D.C. 20006,

RANDOLPH KARR,
670 Pacific Electric Building,
610 South Main Street,
Los Angeles, Calif. 90014,

Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

BLANK PAGE

SUBJECT INDEX

	Page
Jurisdictional statement	1
Opinion below	2
Jurisdiction	2
Statutes involved	4
Questions presented	4
Statement	6
The questions are substantial	10
The record	18
Conclusion	24

Index to Appendices

Appendix A. Order Denying Writ of Review	App. p. 1
Appendix B. Order Denying Rehearing	2
Appendix C. Decision No. 67889, Case No. 7907 (September 22, 1964)	3
Appendix D. Decision No. 68059, Case No. 7907 (October 13, 1964)	12
Appendix E. Supplemental Order	13
Appendix F. Interstate Commerce Act Section 1-(18) to (21), Inclusive	14
Public Utilities Code of the State of California	16
Appendix G. Order	20
Appendix H. Petitioner's Petition for Rehearing	23

TABLE OF AUTHORITIES CITED

Cases	Page
Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U.S. 370	18
Atchison, T. & S. F. Ry. v. Public Util. Comm'n, 346 U.S. 346	4
Colorado v. United States, 271 U.S. 153	11
Lake Erie & Western R. Co. v. Public Utilities Commission, 249 U.S. 422	4
Lathrop v. Donohue, 367 U.S. 820	4
Live Oak Ass'n v. Railroad Commission, 269 U.S. 354	4, 8
Meyers v. Famous Realty, Inc., 271 F. 2d 811	11
Meyers v. Jay Street Connecting Railroad, 259 F. 2d 532	11
Missouri ex rel. Wabash Ry. v. Public Service Comm'n., 273 U.S. 126	14
Northwestern Pac. R. R. v. United States, 228 F. Supp. 690	13
Pennsylvania-Reading Sea. Lines v. Board of Pub. Utilities, 5 N.J. 114, 74 A. 2d 265, cert. den. 340 U.S. 876	15
Piedmont & Nor. Ry. v. United States, 280 U.S. 469	11
Powell v. United States, 300 U.S. 276	12
Railroad Comm'n v. Southern Pac. Co., 264 U.S. 331	17
St. Louis S.W. Ry. v. Missouri Pacific Railroad Co., 289 U.S. 76	11, 12
St. Louis, etc. R. Co. v. Public Utilities Comm's., 279 U.S. 560	15
Southern Ry. v. North Carolina, 376 U.S. 93	13, 15

Page

Sultan R & T Co. v. Department of Labor, 277 U.S. 135 4

Summers, Re, 325 U.S. 561 ..... 19, 33

Texas & Pac. Ry. v. Gulf, etc., Ry., 270 US 266 11

The Atchison, T. & S. F. Ry. v. Railroad Comm'n, 283 U.S. 380 18

United States v. American Sheet & Tin Plate Co., 301 U.S. 402 18

Villa v. Van Schaick, 299 U.S. 152 14

Village of Mantorville v. Chicago Great Western RR, 8 F. Supp. 791 11

Virginia Ry. v. United States, 272 U.S. 658 18

Western Pacific California R. Co. v. Southern Pacific Company, 284 U.S. 47 12

Youngstown Sheet & Tube Co. v. United States, 7 F. Supp. 33 18

Statutes

California Public Utilities Code, Sec. 63, p. 368 ....2, 17

California Public Utilities Code, Sec. 63, p. 371 17

California Public Utilities Code, Sec. 63, p. 465 2

California Public Utilities Code, Sec. 202 4

California Public Utilities Code, Sec. 310 .....2, 4

California Public Utilities Code, Sec. 761 .....2, 4, 14

California Public Utilities Code, Sec. 762 .....2, 4, 17

California Public Utilities Code, Sec. 1706 20

California Public Utilities Code, Sec. 1756 .....3, 19

California Public Utilities Code, Sec. 1757 .....
.....3, 13, 14, 20

Page

California Public Utilities Code, Sec. 1759 23

California Statutes of 1951, Chap. 764, Sec. 1759, p. 2091 23

California Statutes of 1951, Chap. 764, p. 2035 2

California Statutes of 1951, Chap. 764, p. 2052 ....2, 14

California Statutes of 1951, Chap. 764, p. 2080 20

California Statutes of 1951, Chap. 764, p. 2090 .....3, 13, 20

California Statutes of 1963, Chap. 461, Sec. 6, p. 1310 .....3, 20

California Statutes of 1965, Chap. 27 12

Interstate Commerce Act, Sec. 1(18) 4, 10, 15

Interstate Commerce Act, Sec. 1(18-20) 3, 11

Interstate Commerce Act, Sec. 1(19)..... 4

Interstate Commerce Act, Sec. 1(20).....4, 10, 11, 12

United States Code, Title 49, Sec. 1(18-20)..... 8

United States Code, Title 49, Sec. 1(20).. ..4, 6, 8, 12

United States Code, Title 28, Sec. 1257(2) 4, 21

United States Judicial Code, Sec. 1257(2) 21

United States Constitution, Fourteenth Amendment 5, 6, 9, 16

IN THE

Supreme Court of the United States

October Term, 1965
No. .....

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellant, Northwestern Pacific Railroad Company, appeals from the judgment of the Supreme Court of the State of California, entered April 21, 1965, denying a Petition for Writ of Review from an order of the Public Utilities Commission of the State of California[1] dated September 22, 1964, requiring appellant to reconstruct its Puerto Suello Tunnel in Marin County, California. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

[1]The Public Utilities Commission of the State of California is hereafter referred to as California Commission.

Opinion Below.

The Supreme Court of the State of California rendered no opinion and its orders are unreported. Its Order denying a petition for Writ of Review is attached hereto as Appendix A. Its Order denying a Petition for Rehearing is attached hereto as Appendix B.

The Opinion and Order of the California Commission is reported at 63 Cal. P.U.C. 368 (1964), a copy of which is attached hereto as Appendix C. The Order Amending Decision and Denying Rehearing of the California Commission is reported at 63 Cal. P.U.C. 465 (1964), a copy of which is attached hereto as Appendix D. The Supplemental Order of the California Commission which is not yet reported is attached hereto as Appendix E.

Jurisdiction.

This action was an investigation instituted by appellee California Commission on its own motion pursuant to Secs. 310, 761 and 762 of the Public Utilities Code of California (California Stat. 1951 Chap. 764, pp. 2035 and 2052) to determine if appellant had any plans or intent to reconstruct its Puerto Suello tunnel and restore rail service as it existed prior to a fire that destroyed the tunnel in 1961 and to determine if appellant should be ordered to do so.

The order of appellee California Commission was entered September 22, 1964.

The California Commission found the appellant would delay rebuilding its tunnel in the absence of an affirmative order to reconstruct the tunnel, and that the order of the California Commission was to supplement an

earlier order of Interstate Commerce Commission denying authority to abandon the tunnel, with appellee's own affirmative order. The California Commission refused to consider substantially changed conditions and disregarded a pending application before the Interstate Commerce Commission based on substantially changed condition to abandon the same tunnel. The appellee proceeded in disregard of the provisions of the Interstate Commerce Commission Act (Sec. 1(18-20)) wherein the Interstate Commerce Commission has been given the exclusive jurisdiction over authorizing railroad abandonments, and the District Court has been given sole, complete and affirmative jurisdiction over unauthorized abandonments, including indefinite suspensions of service, as here.

A Petition for Rehearing was denied by appellee's Order Amending Decision and Denying Rehearing entered October 13, 1964.

The appellant thereupon filed in the Supreme Court of the State of California a Petition for Writ of Review pursuant to the authority of the state statute (Sec. 1756 and 1757 Public Utilities Code, Calif. Stats. 1963, c. 461, p. 1310, Sec. 6 and Calif. Stats 1951, c. 764, p. 2090, respectively).

The Supreme Court of the State of California denied without opinion the Petition for Writ of Review on March 10, 1965 and further denied, without opinion, a Petition for Rehearing on April 21, 1965.

Notices of Appeal to this Court were filed on July 19, 1965, with both the Supreme Court of the State of California and appellee California Commission. By order of Mr. Justice Harlan dated September 17, 1965,

the time for docketing this case on appeal was extended to October 16, 1965. Thus, the case involved a judgment by the highest court of a state where the validity of a state statute or authority exercised under the state was drawn in question as being repugnant to a law of the United States and a decision was made in favor of its validity. The Court, therefore, has jurisdiction under 28 U.S. Code Sec. 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Atchison, T. & S. F. Ry. v. Public Util. Comm'n*, 346 U. S. 346, 348 (1953); *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354, 356 (1926); *Lake Erie & Western R. Co. v. Public Utilities Commission*, 249 U.S. 422, 424 (1919); *Sultan R & T Co. v. Department of Labor*, 277 U.S. 135, 136 (1928); *Lathrop v. Donohue*, 367 U.S. 820, 824-5 (1961).

Statutes Involved.

Section 1 (18), (19) and (20) of the Interstate Commerce Act as amended; Sections 202, 310, 761 and 762 of the Public Utilities Code of the State of California as amended, are set forth in Appendix F herein.

Questions Presented.

1. Whether jurisdiction over unauthorized abandonments of railroads engaged in interstate commerce, that is, failure to reconstruct a main line tunnel, is in the District Court of the United States (49 U.S.C. 1 (20)), and whether that jurisdiction is sole, affirmative and complete, to the exclusion of action on that subject by the California Commission.

2. Whether the disaster and catastrophe that appellant suffered during Christmas week of 1964, and subsequent to the California Commission's orders and decisions, wherein appellant suffered a flood damage net loss of over $10,000,000 when 100 miles of its 276 mile railroad was destroyed (and since rebuilt), and whether the railroad's substantial loss of business therefrom, that has created a huge net loss position, so that to require the rebuilding of its Puerto Suello Tunnel at a cost of $900,000, should or can be considered in connection with the issues of undue burden, confiscation and violation of due process under the Fourteenth Amendment to the Constitution of the United States, and whether the failure of the Supreme Court of the State of California to consider such matters was arbitrary, unreasonable and violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the Public Utilities Commission of the State of California can order specific service, that is, the number of trains to be operated on a railroad, without allowing to be presented or considering evidence on the subject, and if in so ordering specific rail service the California Commission can disregard the statutory provision requiring a hearing by precluding evidence on the subject.

4. Whether the California Commission can issue an affirmative and supplemental order to an order of the Interstate Commerce Commission relying solely on the order of the Interstate Commerce Commission in an abandonment matter, and without any other evidence to support the California Commission's order, although the California statute under which the California Com-

mission was proceeding required a hearing, and further can the California Commission reject all evidence of changed conditions and ignore a pending proceeding before the Interstate Commerce Commission in reaching its decision that ordered reconstruction of a tunnel, without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of 49 U.S.C. 1 (20).

5. Whether the Public Utilities Commission of the State of California should have stayed its hand until the proceedings to abandon in F. D. 23249 before the Interstate Commerce Commission were completed and action in that matter became final.

6. Whether the California's Commission's erroneous assumption that its order is supplemental to an Interstate Commerce Commission order resulted in such prejudicial error that the Public Utilities Commission of the State of California did not regularly pursue its authority.

Statement.

Appellant is a railroad of 276 main line mileage that operates in interstate commerce near the coastal area of Northern California, that is, from San Francisco to a point near the Oregon border. Its Puerto Suello tunnel is located just north of San Rafael, and about 10 miles north of its San Francisco Bay barge terminal. This tunnel was destroyed by fire on July 20, 1961, and will cost about $900,000 to rebuild. The area south of the tunnel in question is served by an existing barge operation across the San Francisco Bay, and thence by rail. The area north of the tunnel is served by existing rail connections with Southern Pacific Company. No rail

service has been conducted through the tunnel since its complete destruction by fire in 1961.

An application (FD 21725) to abandon the Puerto Suello tunnel and its approaches, was filed with the Interstate Commerce Commission on August 21, 1961. Hearings were held between January 25 and June 8, 1962. The interstate Commerce Commission on May 22, 1963, denied the application (320ICC19). On April 17, 1964, a three judge district court dismissed a complaint to set aside the order of the Commission (228 F. 2d 690, and this court on November 23, 1964, affirmed the judgment below (379 U.S. 132).

In the meantime, on August 10, 1964, a new application to abandon was filed with the Interstate Commerce Commission in F.D. 23249 that included the Puerto Suello tunnel and other areas of applicant's property, based on substantially changed conditions that had occurred since the 1962 hearing had been held in the previous abandonment application. This new application, (F.D. 23249), has been the subject of repeated motions to dismiss, but such motions have been finally denied (Appendix G) and hearings before the Interstate Commerce Commission are scheduled to commence on October 18, 1965, to consider whether, among other areas, the Puerto Suello Tunnel should be abandoned.

The Appellee, California Commission, on September 22, 1964, issued its order requiring the Puerto Suello tunnel to be rebuilt (Appendix C), and with knowledge of the pending proceeding to abandon before the Interstate Commerce Commission in F.D. 23249 (that had been filed on August 10, 1964.) The basis for the order of the California Public Utilities Commission was "to supplement the Interstate Commerce Commission order

(F.D. 21725) with an affirmative order" since the appellant was "under no affirmative order to reconstruct the tunnel" "and it is likely that respondent (appellant) will continue to delay in the absence of an affirmative order to reconstruct".

There was drawn in question before the appellee at the time of its hearing on the matter that action by it under the state statute and the authority exercised under the state statute was repugnant to the laws of the United States and specifically that the District Court of the United States had the sole, complete and affirmative jurisdiction in the matter in that exclusive jurisdiction to approve abandonments was vested in the Interstate Commerce Commission (49 U.S.C. 1 [18-20]) and the jurisdiction of the District Court (49 U.S.C. 1 (20)) was sole, affirmative and complete over unauthorized abandonments, including indefinite suspension of service.

The procedure before Appellee California Commission where it institutes an investigation on its own motion does not require responsive pleadings and none were filed. After appellee's order in this matter requiring reconstruction of the tunnel in question, and restoration of specific rail service, a Petition for Rehearing was filed with appellee that fully, carefully and specifically drew into question the validity of the statute and the authority exercised under the state because of repugnancy to the Constitution and laws of the United States (Cf. *Live Oak Water Users Assn. v. Railroad Commission* (269 U.S. 354, 356 [1926]), and specified at length and in detail the federal questions as well as the fact that since the order was based on no evidence, appellant had been deprived of a hearing, and that the actions of appellee and its orders violated the due process

clause of the Fourteenth Amendment to the Constitution of the United States.

Upon its Petition for Writ of Review to the Supreme Court of the State of California, appellant fully, carefully and specifically drew into question the same validity of the statute and the authority exercised under the statute because of the same repugnancy to the Constitution and the laws of the United States, specified at length and in detail the same federal questions as well as the fact that since the order was based on no evidence, that the appellant had been deprived of a hearing, and the action by appellee and its orders violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as directing the Supreme Court of the State of California attention to the fact the same issues that had been raised before appellee in appellant's Petition for Rehearing.

During Christmas week of 1964 a tremendous storm occurred wherein over 100 miles of appellant's 276 miles of main line was washed out and destroyed through the Eel River Canyon in the northern portions of the railroad's operations, with damages of over $10,000,000 net loss. This section of the railroad has been rebuilt, but the tremendous loss has seriously affected the economic soundness of the appellant. The Supreme Court of California refused to consider (under the existing statute) any facts or changed conditions that occurred since the submission matter to the Public Utilities Commission of California (which submission was long before the storm in question), which matters have a direct bearing on undue burden, confiscation and denial of due process under the Constitution of the United States.

The Questions Are Substantial.

The issues in this matter are of importance to the railroad industry and the administration of the Interstate Commerce Act. Section 1(18) of the Interstate Commerce Act provides for the authority of the Interstate Commerce Commission to pass upon railroad abandonments. Section 1(20) of the Interstate Commerce Act provides for the sole, complete and affirmative jurisdiction of the District Court where abandonment is effected without permission of the Interstate Commerce Commission. The order of the California Commission is in direct conflict with the provisions of the Interstate Commerce Act. Further, the California Commission has acted without evidence and authority to support its actions both in the matter of ordering the rebuilding of the tunnel and specifying the number of trains to be operated through the tunnel.

1. The matter of state regulatory commissions intruding themselves in areas where jurisdiction is in the District Court or Interstate Commerce Commission is of great concern to the railroads.

The basis of the California Commission's order in question was that:

> "it is likely that respondent (railroad) will continue to delay (reconstruction of the tunnel) in the absence of an affirmative order to reconstruct."

The California Commission based its authority to require the rebuilding of the tunnel in question upon the assumption it was issuing an order to supplement an Interstate Commerce Order in F.D. 21725 that denied the appellant the right to abandon the tunnel, that is, the purpose of the California Commission was to pre-

vent a continued *de facto* abandonment or indefinite suspension of service, by requiring the rebuilding of the tunnel.

The Interstate Commerce Act in sections 1(18)-(20), has placed matters involving abandonment of railroads within the exclusive jurisdiction of the Interstate Commerce Commission. (*Colorado v. United States*, 271 U.S. 153, 164-66 (1926), *Village of Mantorville v. Chicago Great Western RR.*, 8 F. Supp. 791, 794 (1934)). Further, section 1(20) of the Interstate Commerce Act provides suits for violation of the abandonment sections of the Interstate Commerce Act are to be brought in the district court.

Indefinite suspension of service, as here, is considered abandonment (*Meyers v. Jay Street Connecting Railroad*, 259 F. 2d 532, 535 (1958), and the District Court is the only forum having jurisdiction to prevent an illegal abandonment (*Meyers v. Famous Realty, Inc.*, 271 F. 2d 811, 816, n. 6 (1959).

As pointed out in *Piedmont & Nor. Ry. v. United States*, 280 U.S. 469, 477 (1930), the penalties are for violation of the statute:

> "The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute."

The jurisdiction of the district court over the subject matter has been held to be affirmative and complete. (*Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U.S. 266, 273 (1926), *St. Louis S.W. Ry. v. Missouri Pac. R.R.*, 289 U.S. 76, 82 (1933)), and an injunction action in the District Court is sole remedy for illegal abandon-

ment (*Powell v. United States,* 300 U.S. 276, 287 (1937).

The California Commission was without jurisdiction to issue its order since the sole, affirmative and complete jurisdiction of the subject matter of preventing an abandonment had been placed in the District Court by the provisions of Section 1(20) of the Interstate Commerce Act, and of course the California Commission could have brought an injunction action in the District Court (49 U.S.C. 1(20)) but did not bring such an action, although such procedure was repeatedly called to the attention of the California Commission.

The procedure provided for in the District Court affords an opportunity "to secure an orderly hearing and proper determination of the matter." (*Western Pacific California R. Co. v. Southern Pacific Company,* 284 U.S. 47, 52 (1931); *St. Louis S.W. Ry. v. Missouri Pacific Railroad Co.,* 289 U.S. 76, 82 (1933).

2. During the period of December 18, 1964, to January 7, 1965, and particularly Christmas week, the storms which struck northern California in the Eel River Canyon were unprecedented.[2] Appellant Northwestern Pacific Railroad Company suffered over a $10,000,000 net loss when 100 miles of its 276 mile railroad were destroyed, and not including the railroad's substantial loss of business and revenue.

In a tremendous engineering undertaking, appellant rebuilt its railroad line in the Eel River area that was washed out and damaged by the floods, and the line was

[2]The highway system in the area suffered a tremendous loss. The California Legislature passed a measure that increased the state gasoline tax one cent to raise $58,000,000 to reconstruct the roads and highways in the area (Chapter 27, California Statutes of 1965, approved April 1, 1965).

opened for limited night time traffic in June 1965, while reconstruction to prepare for the normal winter floods continues in the daylight hours.

This more than $10,000,000 net loss suffered by a railroad raises serious financial problems. The railroad's substandard net income or return on investment is such that it will take many long years to recoup the $10,000,000 net flood loss[3] with no money available for additions, betterments and the vast demand on a railroad for new money for new modern facilities. To add to this loss, to require the expenditure of the large sum of money of $900,000 for the rebuilding of the Puerto Suello tunnel on top of the over $10,000,000 net loss suffered in the Christmas flood is an undue burden on the railroad (*Southern Ry. v. North Carolina,* 376 U.S. 93, 101 (1964)), and results in confiscation (*Northwestern Pac. R. R. v. United States,* 228 F. Supp. 690, 694 (1964)). Instead of the past small yearly sub-marginal net profit, the practical effect of the above disaster has created a huge net loss position with the resultant issues of undue burden and confiscation.

Northwestern Pacific Railroad Company's presentation to the Supreme Court of the State of California, in connection with the petition for writ of review filed October 29, 1964, was governed by section 1757 of the Public Utilities Code of California:

> "No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. . . ." (Calif. Stats. 1951, ch. 764, p. 2090.)

---

[3]This statement is predicated upon business remaining as in the past, when, in fact, the shippers too have suffered great losses, and the amount of rail business may be at a lesser volume for years to come.

Appellant presented the matter of the $10,000,000 flood loss to the Supreme Court of the State of California at the first available time by way of a Petition for Rehearing but was met by the argument of appellee that the above cited section 1757 of the Public Utilities Code prohibited the Supreme Court of the State of California from considering such matters. The denial of the Supreme Court of the State of California was without opinion.

The situation is that the Supreme Court of the United States, contrary to the California Court, will consider matters that have occurred since the hearing below. (*Villa v. Van Schaick,* 299 U.S. 152, 155 (1936), *Missouri ex rel. Wabash Ry. v. Public Service Comm'n.,* 273 U.S. 126 (1927).

If the California Commission orders should be considered otherwise valid, it appears the matter should be remanded to the Public Utilities Commission for *consideration* so the matter of this tremendous flood loss can be considered. It is of serious concern to party litigants whether substantial changed factual conditions that have occurred since the hearing below can be ignored, or should properly be considered by the court above.

3. In this matter a state statute (Sec. 761 Calif. Public Utilities Code; Calif. Stats., 1951, Chap. 764, p. 2052) provides the California Commission can, after a hearing, determine and fix the service (number of trains) required. The California Commission in the present matter held a hearing, but the Presiding Commissioners ruled that all evidence regarding service or need for service was inadmissible and without the issues. and excluded all evidence on the subject of changed

conditions and lack of need for service. The California Commission then ordered, without any evidence to support the order, resumption of the same quantity and quality of service, that is six round trips a week and an occasional switch move, as existed before the tunnel fire.

The well-established general rule is that no defect, whether wilful or inadvertent, in the mechanics of the prior discontinuance of rail service provides grounds for a peremptory order requiring restoration of service. The California Commission should have afforded appellant the opportunity of presenting the facts (*St. Louis, etc. R. Co. v. Public Utilities Comm's.*, 279 U.S. 560, 563 (1929)). Where the public necessity and convenience do not require a particular service, there can be no obligation upon a public utility to furnish such service. This obligation is dependent upon the need; without the need, the obligation does not exist (*Pennsylvania-Reading Sea. Lines v. Board of Pub. Utilities*, 5 N.J. 114, 74 A. 2d 265, 271 (1950), cert. denied 340 U.S. 876.)

The only basis of support for such an arbitrary and unreasonable procedure would be that the California Commission was relying upon the order of the Interstate Commerce Commission, in FD 21725 to support such an order. However, FD 21725 was an application to abandon a portion of the railroad and such an application does not involve particular trains or services. (*Southern R. Co. v. North Carolina*, 376 U.S. 93, 101 (1964)). Thus the Interstate Commerce Commission in proceeding under Section 1(18) of the Interstate Commerce Act, could not make any valid finding as the particular number of trains needed to perform the freight service.

The matter is of particular importance to railroads, for if a state regulatory commission can specify the number of trains required to be operated, *ignore* provisions of state statutes providing for hearings on the subject, refuse to consider changed condition, and fix the number of trains without regard to public need, convenience and necessity, then the burden on interstate commerce becomes a very substantial matter as well as the deprivation of due process under the Fourteenth Amendment of the Constitution of the United States.

4. On August 10, 1965, appellant filed a new application (F.D. 23249) with the Interstate Commerce Commission seeking to abandon portions of appellant's rail line that included the Puerto Suello tunnel. This application was based upon the representation "substantially changed conditions exist presently as compared to the situation presented to the (Interstate Commerce) Commission in F.D. 21725, reported at 320 I.C.C. 19," such as the moving away of industries, the decrease of rail business, and the fact the high price of land precludes the future location of industry. Various protestants filed motions to dismiss which, without hearing, were first denied, then granted, and then set aside. The latest ruling of the Interstate Commerce Commission is set forth in Appendix G. The hearing in F.D. 23249, that includes the abandonment of the Puerto Suello tunnel is now set for hearing October 18, 1965. It is submitted the California Commission should be required at least to stay its hand until the Interstate Commerce Commission has passed on the matter, so that appellant will not have to spend $900,000 to rebuild the Puerto Suello tunnel only to find, if the Interstate

Commerce Commission so rules, that the Puerto Suello tunnel may be abandoned and the $900,000 need not be spent. It is of great concern to the railroad industry and the using public to determine whether state regulatory commissions can act without evidence and negate actions of the Interstate Commerce Commission.

5. If it should be considered the jurisdiction of the District Court is not sole affirmative and complete, the orders of the California Commission cannot be supported because they were based on no evidence other than an Interstate Commerce Commission decision in F.D. 21725. Decision No. 67889 (Appendix C) of the California Commission stated:

> "As in the Union Station case this Commission is now free to *supplement* the Interstate Commerce Commission with an *affirmative order,* issued pursuant to Section 762 of the Public Utilities Code, requiring respondent to rebuild the tunnel and to reinstate complete rail service." (63 Cal. P.U.C. 368, 371) (Emphasis added.)

Section 762 of the California Public Utilities Code provides for "a hearing." This, of course, was denied appellant when the California Commission refused to consider or hear evidence of substantially changed conditions or the new pending application No. 23249 before the Interstate Commerce Commission, or any evidence at all.

It was held in the Los Angeles Union Station cases referred to by the California Commission that although the order of the Interstate Commerce Commission was a condition precedent (*Railroad Comm'n v. Southern Pac. Co.,* 264 U.S. 331, 345, 346, 347 (1924)) to any action by the California Commission, that the Califor-

nia Commission had to base its order on evidence presented to that Commission and any order of the California Commission must be judged as to reasonableness from the evidence presented to the California Commission. It is the failure to take and consider evidence by the California Commission and the refusal of the California Commission to hear any evidence other than the introduction of the decision of the Interstate Commerce Commission that invalidated the California Commission's order. In other words, the California Commission had no evidence before it to support its order requiring the rebuilding of the tunnel. *The Atchison, T. & S.F. Ry. v. Railroad Comm'n,* 283 U.S. 380, 396 (1931).

6. Lastly, the California Commission erred in relying on any Interstate Commerce Commission decision, as previous orders of the Interstate Commerce Commission and past fact findings are not *res adjudicata,* and the new facts and changed conditions can always be shown. (*Youngstown Sheet & Tube Co. v. United States,* 7 F. Supp. 33, 36 (1934)). The Interstate Commerce Commission is not bound by any previous opinion of that Commission. (*Arizona Grocery Co. v. Atchison, T. & S.F. Ry.,* 284 U.S. 370 (1932); *Virginian Ry. v. United States,* 272 U.S. 658 (1926); and *United States v. American Sheet & Tin Plate Co.,* 301 U.S. 402, 408 (1937)).

The Record.

In summary, a portion of the record is lodged with and in the custody of the Supreme Court of the State of California and a portion of the record is lodged with and in the custody of the Public Utilities Commission of the State of California. Notices of Appeal were duly filed with both the Public Utilities Com-

mission of the State of California, and the Supreme Court of the State of California. The Public Utilities Commission of the State of California will not certify for transmission of the Clerk of this Court that portion of the record in the custody and possession of the California Public Utilities Commission. On September 13, 1965, a Petition for a Writ of Mandate was filed with the Supreme Court of the State of California to require the Public Utilities Commission of the State of California to certify for transmission to this Court copies of that portion of the record designated in the Notice of the Appeal that is in the custody of and possessed by the Public Utilities Commission of the State of California. On September 15, 1965, the Petition for a Writ of Mandate was denied (Exhibit A of Appendix H). On September 23, 1965, a petition for Rehearing was filed in the Supreme Court of the State of California, a copy of the Petition for Rehearing is attached as Appendix H. No decision on the Petition for Rehearing has been reached. In the event the Supreme Court of the State of California denies the Petition for Rehearing or does not act on the matter within a reasonable length of time, appellant requests that appellee California Commission be required to certify for transmission to this Court the portions of the record in its custody specified in the Notice of Appeal and as required by the Revised Rules of the Supreme Court of the United States (*Re Summers,* 325 U.S. 561, 563 (1945)).

Appellant Northwestern Pacific Railroad Company filed its Petition for Writ of Review, S.F. No. 21861, in the Supreme Court of the State of California seeking a review of Public Utilities Commission's Case No. 7907 (Appendix C), as provided for in section 1756 of the Public Utilities Code of California (Calif. Stat.

1963, ch. 461, p. 1310, §6). This California statute provides that the Supreme Court of the State of California shall direct the Public Utilities Commission to certify and bring up its records as follows:

> "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

Section 1757 of the Public Utilities Code (Calif. Stat. 1951, ch. 764, p. 2090) provides as follows:

> "No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. . . ."

Section 1706 of the California Public Utilities Code (Calif. Stat. 1951, ch. 764, p. 2080) provides in part as follows:

> ". . . In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission. . . ."

The Petition for Writ of Review of this appellant, on pages 7 and 8 thereof, prayed as follows:

> "WHEREFORE, petitioner (appellant) prays that this Court issue a writ of review requiring respondent (appellee) to certify to this (Supreme) Court (of the State of California) its complete record in Case No. 7907, including all pleadings, orders, memoranda, reporter's transcripts, letters and exhibits forming a part of that record; that this Court review the record of said proceedings and thereupon annul and set aside Decisions Nos. 67889 and 68509, . . ."

Appellant's Petition for Writ of Review, S.F. No. 21861, and the accompanying papers addressed to the Supreme Court of the State of California are replete with references to, and quotes from, the transcript and exhibits from the Public Utilities Commission's proceedings.

The Supreme Court of the State of California, by its order denying the Petition for Writ of Review in S.F. No. 21861 dated March 10, 1965, denied a Writ of Review. The Supreme Court of the State of California did not direct the California Commission to certify and bring up the record that had been before the Public Utilities Commission.

This appeal is taken pursuant to section 1257(2) of the *U.S. Judicial Code,* (28 U.S.C. 1257(2)), wherein there is drawn in question the validity of the order of the California Commission, its repugnancy to federal law, and violation of the United States Constitutional provisions. Thus, the evidence and record before the Public Utilities Commission is essential to determine the validity of the orders of the California Commission.

On the 19th day of July, 1965, and within the time allowed by law, appellant duly served and filed identical Notices of Appeal from said orders of the Supreme Court of the State of California; that a certified copy of the Notice of Appeal that was filed with the Supreme Court of the State of California is docketed herewith; that also a Notice of Appeal was filed with the California Commission; that portions of the record appellant desires the Supreme Court of the United States to review are in the custody and possessed by the California Commission.

That heretofore appellant tendered to the California Commission true copies of all the matters designated in the Notice of Appeal to the Supreme Court of the United States filed with the California Commission that are in the custody of the California Commission and offered to pay all charges in connection with certification for transmission to the Supreme Court of the United States; that as early as June 28, 1965, the appellant had taken up with the appellee California Commission the matter of certifying the portion of the record in its custody to the Supreme Court of the United States; that thereafter there were discussions concerning copies of the record to be certified; that it was not until Friday, September 10, 1965, the California Commission, for the first time, advised appellant Northwestern Pacific Railroad Company that the appellee California Commission would do nothing in the matter, and that the appellee California Commission takes the position that it is not obliged to certify a portion of the record made before the appellee California Commission in this matter which was not brought up to the Supreme Court of the State of California and therefore declines to certify that por-

tion of the record in the custody of the appellee California Commission.

On Monday, September 13, 1965, appellant Northwestern Pacific Railroad Company filed in the Supreme Court of the State of California a Petition for a Writ of Mandate, S.F. No. 22132, pursuant to procedure provided for in the State of California (§ 1759 of the California Pub. Util. Code; Calif. Stat. 1951, ch. 764, p. 2091, § 1759), requesting that the Supreme Court of the State of California direct the appellee California Commission to certify copies of the designated portions of the record (set forth in the Notice of Appeal) in its custody for transmission to the Supreme Court of the United States. As stated previously, this Petition for a Writ of Mandate was denied on September 13, 1965, and a Petition for Rehearing (Appendix H) was filed on September 23, 1965, with the Supreme Court of the State of California, and decision is awaited.

If the Supreme Court of the State of California denies the Petition for Rehearing or declines to issue a Writ of Mandate, or does not act on the matter within a reasonable length of time, it is respectfully requested that this Court require and direct the appellee to certify for transmission to this Court the portions of the record in its custody specified in the Notice of Appeal and as required by the Revised Rules of the Supreme Court of the United States (*Re Summers,* 325 U.S. 561, 563 (1945)). A detailed argument in support of said request is set forth in appellant's Petition for Rehearing denying a Petition for a Writ of Mandate attached hereto as Appendix H.

Conclusion.

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

THORMUND A. MILLER,
JEREMIAH C. WATERMAN,
RANDOLPH KARR,
By RANDOLPH KARR,
Attorneys for Appellant.

BLANK
PAGE

BLANK
PAGE

APPENDIX A.

Order Denying Writ of Review.

In the Supreme Court of the State of California in Bank.

Northwestern Pacific Railroad Company v. Public Utilities Commission. S.F. No. 21861.

Petition for writ of review Denied.

Peters, J., is of the opinion that the petition should be granted.

Traynor
Chief Justice

APPENDIX B.

Order Denying Rehearing.

In the Supreme Court of the State of California in Bank.

Northwestern Pacific Railroad Company v. Public Utilities Commission. S.F. No. 21861.

..... petition for rehearing Denied.

Peters, J. is of the opinion that the petition should be granted.

Traynor
Chief Justice

APPENDIX C.

Decision No. 67889, Case No. 7907
(September 22, 1964).

Orders *Northwestern Pacific Railroad Company* to reopen Puerto Suello Tunnel, San Rafael, damaged by fire.

[1] Commission—Jurisdiction. While the Interstate Commerce Commission may have exclusive jurisdiction over abandonment of a railroad line or a portion thereof under Section 1(18) (20) of the Interstate Commerce Act, under section 762 of the Public Utilities Code the California Commission may require a public utility to repair existing plant and facilities for the convenience of the public and to secure adequate service. See *AT&SF Ry. Co. v. Railroad Com. of Cal.*, 75 L.Ed. 1128, 283, U.S. 380 (1931).

Randolph Karr, for respondent.

Graham James & Rolph, by *Boris H. Lakusta* and E. Myron Bull, Jr., for Cities of San Rafael, San Anselmo, Fairfax, and Sausalito; County of Marin, Marin Industrial Development Foundation, Camgros Gravel & Fuel Co., Inc., Chris Craft Sales of San Rafael, Colonial Wax Products Corporation of California, Golden Gate Distributing Co., Henry Hess Co., California Newspapers, Inc. (San Rafael Independent Journal), McPhail Fuel Co., PBM, Inc., Rice Supply, Inc., A. G. Schoonmaker Co., Service Lumber Co., Shamrock Materials, Inc.; *George W. Ballard* and *James L. Evans*, for Brotherhood of Railroad Trainmen AFL-CIO, Brotherhood of Locomotive Firemen & Enginemen AFL-CIO, and *Leonard M. Wickliffe*,

for Railroad Brotherhoods' California Legislative Association, interested parties.

Hector Anninos, for the Commission staff.

OPINION

By its order dated May 19, 1964, the Commission instituted an investigation into the operations and service of Northwestern Pacific Railroad Company for the following purposes:

> "1. To determine what plans or intent, if any respondent has in connection with reconstruction of the Puerto Suello tunnel and restoration of service as it existed prior to the fire.
>
> 2. To determine whether respondent should be ordered to reconstruct the Puerto Suello tunnel and restore the prior existing service.
>
> 3. To determined whether any other order or orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction."

A public hearing was held before Commissioner Bennett and Examiner Daly on June 8, 1964, at San Rafael. The matter was submitted upon the receipt of concurrent briefs since filed and considered.

Respondent is presently engaged as a railroad corporation common carrier and public utility as those terms are defined in the Constitution of the State of California and in the Public Utilities Code. It operates generally between Arcata, on the north, and the San Francisco Bay Area, on the south. Connections are made with respondent's parent company, Southern Pacific Company, by virtue of a branch line between

Ignacio and Schellville. Respondent also connects with The Atchison, Topeka & Santa Fe Railway Company at Tiburon. The connection is via a car ferry operated by Santa Fe between Tiburon and Richmond.

The record indicates that on July 20, 1961, respondent's Tunnel No. 4 (Puerto Suello Tunnel), which is located on the northern city limits of San Rafael, was damaged by fire. As the result of cave-ins the tunnel was completely closed thereby cutting respondent's main line between San Rafael and Tiburon. In August of the same year respondent filed an application (Finance Docket No. 21725) with the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1(18) of the Interstate Commerce Act to abandon that portion of its line south of the tunnel. Following ten days of hearing in 1962 and consideration of the extensive briefs, the hearing examiner recommended denial of the certificate (Exhibit No. 1). After the filing of exceptions to the examiner's report and oral argument before Division 3 of the Interstate Commerce Commission, the Commission on June 5, 1963 adopted the recommendation of the hearing examiner. Shortly thereafter the Interstate Commerce Commission declined to make a finding of general transportation importance, a prerequisite to the filing of a petition for rehearing by the entire Commission. Having exhausted its administrative remedies, respondent appealed to a three-judge Federal District Court in San Francisco. The matter was again extensively briefed, and oral argument was held in San Francisco on April 10, 1964. On April 17, 1964, the court dismissed the appeal and affirmed the order of Division 3 of the Interstate Commerce Commission. On

June 15, 1964, respondent filed its notice of appeal to the Supreme Court of the United States.

Respondent contends that the applicable provisions of the Interstate Commerce Act preclude any action by this Commission. It further contends that if the Commission requires the tunnel to be rebuilt, then, as a practical matter, respondent will have been deprived of its right of appeal in the abandonment case.

This Commission will concede that the Interstate Commerce Commission has exclusive jurisdiction over abandonment of a railroad line or a portion thereof under Section 1(18) (20) of the Interstate Commerce Commission. However, this Commission has jurisdiction under Section 762 of the Public Utilities Code to require a public utility to repair existing plant and facilities for the convenience of the public and to secure adequate service.[1]

---

[1]Section 762 reads as follows:

"Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost; the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured." (Former Sec. 36)

The United States Supreme Court in *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California*, 75 L. Ed. 1128, 283 U.S. 380 (1963), has made it clear that the authority of this Commission to require a railroad to make necessary repairs has not been abrogated by the Interstate Commerce Act. In that case this Commission ordered certain railroads to construct a union station in Los Angeles. Prior to that time this Commission and the City of Los Angeles had petitioned the Interstate Commerce Commission requesting that the Interstate Commerce Commission order the construction of the union station and for the issuance of certificates of public convenience and necessity permitting the extension and abandonment of certain lines incidental to the construction of the union terminal. The Interstate Commerce Commission issued the certificates, but refused to order the construction of the union station. The position of the Interstate Commerce Commission was sustained on appeal *Interstate Commerce Commission v. United States of America*, 280 U.S. 52, 74 L. Ed. 163 (1929). The issue on appeal was whether this Commission had the authority to order the construction of the union station. In affirming such power in this Commission the Supreme Court stated the following:

> "The considerations which led the court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that *the authority which resided in the state had not been taken away except to the extent that the approval of the Federal Commission was required.* The principle thus applicable has been frequently stated. It

is that the *Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state.* [Citing cases.] We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained, and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act." (Emphasis added.)

In the instant proceeding the Interstate Commerce Commission denied the certificate to abandon, and said order was affirmed by the District Court. The denial was based upon the grounds that restoration of the tunnel and of the service offered prior to the fire would not constitute an undue burden upon interstate commerce, and that public convenience and necessity did not permit the abandonment. As in the Union Station case this Commission is now free to supplement the Interstate Commerce Commission order with an affirmative order, issued pursuant to Section 762 of the Public Code, requiring respondent to rebuild the tunnel and to reinstate complete rail service.

At the present time respondent is under no affirmative order to reconstruct the tunnel. If the United States Supreme Court affirms the District Court and the Interstate Commerce Commission it is likely that respond-

ent will continue to delay in the absence of an affirmative order to reconstruct.

In response to respondent's argument that an order to reconstruct would have the effect of denying respondent its right of appeal, it may be said that if its notice of appeal to the United States Supreme Court is predicated upon merit respondent may request a stay of this Commission's order pending determination by the United States Supreme Court.

After consideration the Commission finds that:

1. Respondent is a railroad corporation, common carrier and public utility carrier subject to the jurisdiction of this Commission.

2. Respondent operates between Arcata and the San Francisco Bay Area.

3. On July 20, 1961, respondent's Tunnel No. 4 (Puerto Suello Tunnel) was damaged by fire, resulting in cave-ins which closed the tunnel and thus blocked respondent's main line at a point just north of the City of San Rafael.

4. Following extensive hearings, briefs and oral argument the Interstate Commerce Commission, Division 3, on May 22, 1963, denied respondent's application for a certificate to abandon rail service south of San Rafael. Said Commission subsequently failed to find that an issue of general transportation importance was involved as requested by respondent.

5. On April 17, 1964, following briefs and arguments a three-judge court for the Federal District Court for the Northern District of California affirmed the order of the Interstate Commerce Commission, Division 3.

6. On June 15, 1964, respondent filed its notice of appeal to the Supreme Court of the United States.

Conclusion

The Commission concludes that pursuant to Section 762 of the Public Utilities Code respondent should be required to commence restoration of Tunnel No. 4 (Puerto Suello Tunnel) within thirty days after the effective date of this order and should complete said restoration as soon as possible, and in no event in a period longer than 150 days, and upon completion should restore the same quantity and quality of rail service as that provided prior to the destruction of the tunnel.

ORDER

IT IS ORDERED that:

1. Within thirty days after the effective date hereof Northwestern Pacific Railroad Company shall commence reconstruction of Tunnel No. 4 (Puerto Suello Tunnel) and shall complete said reconstruction with all dispatch, and in no event longer than one hundred fifty days from the date of commencement.

2. Within five days after commencement respondent shall file with this Commission a report setting forth in detail its final plans for reconstruction of Tunnel 4 and the date when actual physical work of restoration first began.

3. Within five days after reconstruction of Tunnel No. 4 has been completed respondent shall restore the same quantity and quality of rail service as that provided prior to the destruction of said Tunnel No. 4, and within said period of time shall file with this Commission a report indicating the date of completion, the

date that complete rail service is restored and the nature of the service provided.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 22nd day of September, 1964.

Mitchell, McKeage, Bennett,
Commissioners

I concur in the findings and order.
/s/ Frederick B. Holoboff

I concur in the findings and order.
/s/ George G. Grover

APPENDIX D.

Decision No. 68059, Case No. 7907
(October 13, 1964).

ORDER AMENDING DECISION AND DENYING REHEARING

Northwestern Pacific Railroad Company having filed a petition for rehearing and request for oral argument before the full Commission and stay of Decision No. 67889, and the Commission having considered said petition and request and each and every allegation therein,

IT IS ORDERED:

1. Decision No. 67889 is amended by adding the following finding on sheet 7 of the opinion therein;

> "7. That restoration of respondent's Tunnel No. 4 is necessary for the convenience of the public and to secure adequate service."

2. The petition for rehearing and stay of Decision No. 67889, as amended herein, is denied.

Dated at San Francisco, California, this 13th day of October, 1964.

Holoboff, *President*
Mitchell, McKeage, *Commissioners*

Commissioner George G. Grover, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX E.

Supplemental Order.

Before the Public Utilities Commission of the State of California. Decision No. 68987.

Investigation on the Commission's own motion into the operations and services of Northwestern Pacific Railroad Company in connection with the Puerto Suello Tunnel, San Rafael, California. Case No. 7907 (Filed May 19, 1964).

Petition for writ of review of Decision No. 67889 having been filed with the Supreme Court of California (Northwestern Pacifil Railroad Co. v. P.U.C., S.F. No. 21861) and a stay of this Commission's order therein having been issued by said Court pending final determination of the petition for writ of review, and it appearing further that the petition for writ of review was denied by the Court on March 10, 1965 and that petition for rehearing was denied on April 21, 1965, and that said stay is now vacated,

It Is Ordered that the effective date of Decision No. 67889 is made the date hereof.

Dated at San Francisco, California, this 4th day of May, 1965.

Frederick B. Holoboff
President

Peter E. Mitchell
George G. Grover
William M. Bennett
A. W. Gatov
Commissioners

APPENDIX F.

Interstate Commerce Act Section 1 (18) to (21), Inclusive.

§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4(c), 54 Stat. 901.

§ 1, par. (19). *Application for certificate of Commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is construced or operates. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 478; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

§ 1, par. (20). *Issuance of certificate by Commission; unlawful extension or abandonment of lines.* The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may,

without securing approval other than such certificate comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 478.

Public Utilities Code of the State of California.

§ 202. *Interstate and foreign commerce*

Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States; but with reference to passenger stage corporations operating in in-

terstate commerce between any point within this State and any point in any other state or in any foreign nation, the commission may prescribe such reasonable, uniform and nondiscriminatory rules in the interest and aid of public health, security, * * * convenience, and general welfare as, in its opinion, are required by public convenience and necessity. (As amended Stats. 1963, c. 2148, p. 4481, § 1.)

§ 310. *Quorum; investigation, inquiry, and hearing by designated commissioner*

A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. Any investigation, inquiry, or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission. The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom such investigation, inquiry, or hearing has been assigned or, in his or their behalf, by any facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the condi-

tions provided in such rules. (Stats. 1951, c. 764, p. 2052, § 761.)

§ 761. *Commission order or rule; rules for performance of service or furnishing of commodity*

Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules. (Stats. 1951, c. 764, p. 2052, § 761.)

§ 762. *Order for addition, repair, or change in physical property; site of new structure; order requiring joint action; division of cost*

Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate

service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured. (Stats. 1951, c. 764, p. 2052, § 762.)

APPENDIX G.

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 29th day of July, A.D. 1965.

Finance Docket No. 23249

NORTHWESTERN PACIFIC RAILROAD COMPANY ABANDONMENT IN MARIN AND SAN FRANCISCO COUNTIES, CALIF.

Upon consideration of the matters and things involved in the above-entitled proceeding, and of the following:

(1) Petition of applicant, filed April 28, 1965, for reconsideration and rehearing of the order of March 24, 1965, granting motions for dismissal of the application;

(2) Petitions by the City of Larkspur, the Town of Corte Madera, and the Corte Madera Chamber of Commerce for leave to intervene and file tendered petitions for reconsideration and rehearing, in support of the application for authority to abandon the Sausalito Branch;

(3) Petitions by the City of Tiburon, the Tiburon Chamber of Commerce, and the Tiburon Property Owners Association, Inc., for leave to intervene and file tendered petitions for reconsideration and rehearing, in support of the application for authority to abandon the portion of applicant's main line between Meadowsweet and Tiburon;

(4) Petition by applicant, filed June 2, 1965, as supplemented June 14, 1965, to terminate a controversy between applicant and the California Public Utilities Commission, concerning the latter's order of September 22, 1964, in case No. 7907, as amended, and the significance of evidence of later storm damage on applicant's financial condition and the requirement for reconstruction of the Puerto Suello Tunnel; and

(5) Replies by The Atchison, Topeka and Santa Fe Railway Company, protestant, filed May 10 and 17 and June 17, 1965, to the above-described petitions; California Public Utilities Commission, filed May 11 and 18, 1965, to applicant's first-described petition and petitions by interveners; and protestants, the City of San Rafael et al., filed May 12 and 17, 1965, to said petitions;

and good cause therefor appearing:

It is ordered, That the City of Larkspur, the Town of Corte Madera, the Corte Madera Chamber of Commerce, the City of Tiburon, the Tiburon Chamber of Commerce, and the Tiburon Property Owners Association, Inc., be, and they are hereby, permitted to intervene in support of the application and be treated as parties herein, with the right to file the tendered petitions for reconsideration and rehearing, and to have notice of and to participate in future proceedings, provided that such permission shall not be construed as allowing interveners unduly to broaden the issues.

It is further ordered, That the petitions of applicant and interveners for reconsideration and rehearing be, and they are hereby granted;

It is further ordered, That upon reconsideration, the order of March 24, 1965, dismissing the application be, and it is hereby, vacated and set aside;

It is further ordered, That the proceeding be, and it is hereby, assigned for hearing at a time and place to be hereafter designated; and

It is further ordered, That applicant's petition, as supplemented, to terminate the controversy with the California Public Utilities Commission be, and it is hereby, dismissed as moot.

By the Commission, Division 3, acting as an Appellate Division.

H. Neil Garson,
Secretary.

(Seal)

APPENDIX H.

Petitioner's Petition for Rehearing.

In the Supreme Court of the State of California.

Northwestern Pacific Railroad Company, a corporation, Petitioner, vs. Public Utilities Commission of the State of California, Respondent. S.F. No. 22132.

Petitioner, Northwestern Pacific Railroad Company, in the above matter, and in which a decision was rendered by this court on September 15, 1965, a copy of which is attached hereto as Exhibit A, respectfully requests a rehearing, and that said decision be set aside and a Petition for Writ of Mandate be granted, on the following grounds:

GROUNDS OF PETITION

The decision and order in this matter are directly contrary to the rules of law and decisions of the Supreme Court of the United States, and the holding of this court is not only without authority in law, but directly contrary thereto.

ARGUMENT

I

FOREWORD

What is involved is what portions of the record should be placed before the Supreme Court of the United States in an appeal now pending in that court. Under the limited procedure for review of Public Utilities Commission in California (Sec. 1756) the record of the Public Utilities Commission is not brought up to the Supreme Court of the State of California unless a Petition for Writ of Review is granted. Here the Petition for Writ of Re-

view was denied, and this Court did not bring up the record before the Public Utilities Commission. The question is whether this limited procedure in California can restrict the record to be placed before the Supreme Court of the United States and if the procedural limitations provided for in the California statutes can restrict the review of the Supreme Court of the United States.

II

THE DECISION OF THIS COURT IN DENYING A PETITION FOR A WRIT OF MANDATE IS DIRECTLY CONTRARY TO THE HOLDING OF THE SUPREME COURT OF THE UNITED STATES.

The subject matter of the Petition for a Writ of Mandate involved a Petition for a Writ of Review (SF No. 21861) from the Public Utilities Commission decision (case 7907) wherein this Court did not bring up the record (Sec. 1756 Public Utilities Code). Petitioner has appealed to the Supreme Court of the United States. (See Notice of Appeal, Appendix B, to Petition for Writ of Mandate and Notice of Appeal filed in S.F. No. 21861). The Public Utilities Commission will not certify the record in its custody for transmission to the Supreme Court of the United States, and this court in denying a Petition for Writ of Mandate to require the certification of the record in the custody of the Public Utilities Commission for transmission to the Supreme Court of the United States give as a reason in this Court's decision of September 15, 1965 (Exhibit A hereto):

> "The Public Utilities Commission record was not before us in our consideration and disposition of the proceeding for review. . . ."

See also on this subject the Order of Mr. Justice Harlan of the Supreme Court of the United States of September 17, 1965, granting additional time for docketing the case, attached hereto as Exhibit B.

The same position taken by this court was taken by the Supreme Court of the State of Illinois and the Supreme Court of the United States held such position was without merit. The Supreme Court of the United States ordered the Supreme Court of the State of Illinois to procure and bring up the record that was in the custody of another body and which record had not been before the Supreme Court of Illinois.

The action of the Supreme Court of the United States in directing the Supreme Court of the State of Illinois to bring up the portion of the record not in its custody is mentioned in *Re Summers* 323 US 705 (1944), and described in *Re Summers* 324 US 561, 567 (1945):

> "Our rule on the petition for certiorari required the Supreme Court of Illinois to show cause why a record should not be certified and the writ of certiorari granted."

and then the Court in *Re Summers* 325 US 561, 563 (1945) footnote 2, reviewed the matter and pointed out its holding as follows;

> "[2]The petition for certiorari was not accompanied by a certified record. Rule 38(1). It alleged an inability to obtain a record from the Clerk of the Supreme Court of Illinois because the documents were not in that official's custody. See note 8, infra. No opposing brief was filed. After the expiration of the time for opposing briefs, rule 38(3), a rule issued 'returnable within 30 days, requiring the Su-

preme Court of Illinois to show cause why the record in this proceeding should not be certified to this Court and also why the petition for writ of certiorari herein should not be granted.' Journal, Supreme Court of the United States, October Term, 1944, p. 6. A return was duly made by the Chief Justice and the Associate Justices of the Supreme Court of Illinois which stated the position of the justices on the certification of the supposed and alleged record and their opposition to the granting of the certiorari. On consideration our writ of certiorari issued, directed to the Honorable, the Judges of the Supreme Court of Illinois, commanding that 'the record and or papers and proceedings' be sent to this Court for review. Journal, Supreme Court of the United States, October Term, 1944, p. 93. The papers comprising the proceedings before the Supreme Court of Illinois were certified to us by the Clerk of that court."

The authoritative text entitled "Supreme Court Practice" by Stern and Gressman, Third Edition (1962) carefully points out that in some state court cases, the record may not be, and may never have been possessed by the court whose judgment is under attack, yet that record must be brought up:

"The task of ordering and obtaining the certified record is one to be performed exclusively by counsel for the petitioner. The Court will not, by writ or otherwise, assist in that task except in unusual circumstances, as where the lower court refuses to supply counsel with the record. In *re Summers*, 325 U.S. 561, 562, n.2. Usually, the record is to be found in the lower court whose judg-

ment is the subject of the petition, as is almost invariably true in cases coming from the federal courts. But in some state court cases, the record may not be, and may never have been, possessed by the court whose judgment is under attack. Counsel for petitioner must then ascertain where the record is and have it certified by the clerk of whatever lower court then has it. In some states, the record may have been divided among several courts; the various portions thus must be certified by and obtained from the clerks of the respective courts possessing those portions". (p. 242)

III

NO ACTION, INACTION OR PROCEDURAL LIMITATION OF OR ON THE SUPREME COURT OF THE STATE OF CALIFORNIA, CAN LIMIT THE REVIEW OF THE SUPREME COURT OF THE UNITED STATES

The appeal of petitioner Northwestern Pacific Railroad Company to the Supreme Court of the United States involves federal constitutional issues. (See Notice of Appeal, Appendix B, to Petition for Writ of Mandate, and Notice of Appeal on file in S.F. No. 21861). The review of the California Supreme Court of the Public Utilities Commission where federal constitutional issues are raised is provided for in Section 1760 of the Public Utilities Code as follows:

"Sec. 1760. When Supreme Court to exercise independent judgment on law and facts. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of

> the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

The record before the Public Utilities Commission is described in Sections 1706, 1756 and 1757 of the Public Utilities Code.

Petitioner Northwestern Pacific Railroad Company filed its Petition for Writ of Review (raising federal questions) S.F. No. 21861, in the Supreme Court of the State of California seeking a review of Public Utilities Commission's Case No. 7907, as provided for in section 1756 of the Public Utilities Code of California (Calif. Stat. 1963, ch. 461, p. 1310, Sec. 6).

Petitioner's Petition for Writ of Review, S.F. No. 21861, and the accompanying papers addressed to the Supreme Court of the State of California are replete with references to, and quotes from, the transcript and exhibits from the Public Utilities Commission's proceedings.

This California statute (Sec. 1756, Public Utilities Code) provides that the Supreme Court of the State of California shall direct the Public Utilities Commission to certify and bring up its record only under the following circumstances:

> "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the orig-

inal order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

The Supreme Court of the State of California, by its order denying the Petition for Writ of Review in S.F. No. 21861 dated March 10, 1965, denied a Writ of Review (and on May 7, 1965, denied a Petition for Rehearing). The Supreme Court of the State of California did not direct the Public Utilities Commission to certify and bring up the record that had been before the Public Utilities Commission.

There were no statutory or rule provisions whereby petitioner could take steps to bring up a properly certified record for this court's consideration other than pray such be done in the Petition for a Writ of Review (which was done) and this Court did not bring up the record although this Court was required to exercise an independent judgment on the facts. (Sec. 1760, Public Utilities Code). It is submitted no procedural limitation as here on bringing up the record can limit the review of the Supreme Court of the United States on federal constitutional issues.

The appeal of petitioner to the Supreme Court of the United States (See Notice of Appeal, Appendix B to Petition for a Writ of Mandate and Notice of Appeal on file in S.F. No. 21861) was taken pursuant to 28 USC 1257 (2) as follows:

"Final judgment or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court as follows: . . . '2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' "

The question is whether the Supreme Court of the State of California can limit the review of the Supreme Court of the United States by excluding the record made before the Public Utilities Commission. The answer, of course, is that the Supreme Court of the United States will look to the whole record, not the limited record before the Supreme Court of the State of California wherein the Supreme Court of the State of California did not bring up the record of the Public Utilities Commission.

The following decisions sustain the jurisdiction of the Supreme Court to review the order of the California Public Utilities Commission by appeal in this case: *Atchison, T. & S.F.Ry. v. Public Util. Comm'n.*, 346 US 348 (1953); *Schroeder v. City of New York*, 371 U.S. 208 (1962).

The court has spoken very clearly that the substantive rights of a party cannot be limited by procedure or local practice in *Brown v. Western Railway of Alabama*, 338 US 294, 296 (1949). The court carefully analyzed the problem and stated a federal right (review of the constitutional questions) cannot be defeated by the forms of local practice:

"It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from

'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure.' To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. Central Vermont R. Co. v. White, 238 US 507, 59 L ed 1433, 35 S Ct 865, Ann Cas 1916B 252, 9 NCCA 265. Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.' Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. See American R. Exp. Co. v. Levee, 263 US 19, 21, 68 L ed 140, 143, 44 S Ct 11. And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it. First Nat. Bank v. Anderson, 269 US 341, 346, 70 L ed 295, 302, 46 S Ct 135; Davis v. Wechsler, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13; Covington & L. Turnpike Road Co. v. Sandford, 164 US 578, 595, 596, 41 L ed 560, 566, 17 S Ct 198. This rule applies to FELA cases no less than to other types. Reynolds v. Atlantic C.L.R.Co. 336 US 207, 93 L ed 618, 69 S Ct 507; Anderson v. Atchison, T. & S.F.R.Co. 333 US 821, 92 L ed 1108, 68 S Ct 854; cf Lillie v. Thompson, 332 US 459, 92 L ed 73, 68 S Ct 140."

Numerous cases hold the Supreme Court of the United States, where federal constitutional deprivations are alleged, will reexamine the evidentiary basis and make an independent examination of the evidence. Some of the cases are cited below.

In *New York Times Co. v. Sullivan,* 376 US 254, 285 (1964), the court said:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

In *Napue v. Illinois,* 360 US 264, 271 (1959) the court said:

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter (US) 1 Whest 304, 4 L ed 97; Cooper v. Aaron, 358 US 1, 3 L 2d 2d 5, 78 S Ct 1401. This principle was well stated in Niemotko v. Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325, 328:
>
> " 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.' "

In *Edwards v. South Carolina,* 372 US 229, 235 (1963) it was contended the appellants had been denied the element of due process of law:

> "But it nevertheless remains our duty in a case such as this to make an independent examination of the whole record. Blackburn v. Alabama, 361 US 199, 205, note 5, 4 L ed 2d 242, 247, 80 S Ct 274; Pennekamp v. Florida, 328 US 331, 335, 90 L ed 1295, 1297, 66 S Ct 1029; Fiske v. Kansas, 274 US 380, 385, 386, 71 L ed 1108, 1110, 1111, 47 S Ct. 655."

In *Kern-Limerick Inc. v. Scurlock,* 347 US 110, 121 (1954) the court said:

> ". . . the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

In *Niemotko v. Maryland,* 340 US 268, 271 (1951) the court said:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded. See Feiner v. New York, decided this day, 340 US 315, post, 295, 71 Ct 303, 328."

In *Feiner v. New York,* 340 US 315, 316 (1951) the court said:

> "In the review of state decisions where First Amendment rights are drawn in question, we of course make an examination of the evidence to ascertain independently whether the right has been violated."

The matter again was well stated in *Local No. 438 v. Curry,* 371 US 542, 551 (1963):

> "The Georgia court's denial of this federal claim was held reviewable here although ordinarily the overruling of a demurrer is not a final judgment. This Court looked to the whole record, as we are entitled to do in determining questions of finality."

and in *Local Union No. 10 A.F. of L. v. Graham,* 345 US 192, 197 (1953) where it was contended a statute was unconstitutional:

> "In a case of this kind, we are justified in searching the record to determine whether the crucial finding by the state courts had a reasonable basis in the evidence.[4]".

and in support thereof in footnote 4, stated:

> "4 '. . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. . . .
>
> "'. . . We have not only his (the master's) findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked.' Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 US 287, 293, 294, 85 L ed 836, 841, 842, 61 S Ct 552, 132 ALR 1200."

The authoritative text entitled Supreme Court Practice by Stern and Gressman, Third Edition (1962) gives another very practical approach to the problem:

> "As has been stated, the notice of appeal contains the appellant's designation of the parts of the record to be certified by the clerk of the lower court to the Supreme Court. The appellant should designate not only those portions of the record he thinks may be useful to him, but all that will be necessary to give the Court an understanding of the questions presented." (p. 274).

It is to be remembered the appeal in question is taken pursuant to section 1257(2) of the *U.S. Judicial Code,* (28 U.S.C. 1257(2)), wherein there is drawn in question the validity of the order of the Public Utilities Commission as relates to the federal constitutional issues.

Thus, the evidence and record before the Public Utilities Commission is essential to determine its validity (Sec. 1760 Public Utilities Code). Of course, one ground of error is that the Supreme Court of the State of California did not grant the Petition for Writ of Review and did not bring up the record as provided for in sections 1756, 1757, 1760 and 1706 of the Public Utilities Code. The Supreme Court of the United States (where as here, federal constitutional issues are involved —See Petition for Writ of Mandate, Appendix B, pp. 3-8 thereof) will examine all the evidence to ascertain independently whether federal constitutional rights have been violated. (See cases cited above). Thus, the Cali-

fornia Supreme Court cannot properly refuse to transmit or order transmitted a certified copy of the recod before the Public Utilities Commission to the Supreme Court of the United States by saying there was no procedure to bring up the record to it, or this court had not brought up the record, or the record was not before this court, since a substantive right is involved, that is, a review of all the evidence by the Supreme Court of the United States to determine federal constitutional issues. (*Brown v. Western Railway of Alabama,* 338 US 294, 296 (1949).

CONCLUSION

It is submitted that the petition for rehearing should be granted and such is essential to the proper determination of the issues presented herein.

Respectfully submitted,

/s/ Randolph Karr,
Randolph Karr, Attorney for
Petitioner Northwestern Pacific
Railroad Company

EXHIBIT A

In the Supreme Court of the State of California, in Bank.

Northwestern Pacific Railroad Company v. Public Utilities Commission, etc. S.F. No. 21861, S.F. No. 22132.

Filed Sept. 15, 1965.

The motion to enlarge time for docketing appeal in the United States Supreme Court and the petition for writ of mandate are denied for the reasons that the Public Utilities Commission record was not before us in our consideration and disposition of the proceeding for review and that any application for an order that would serve to extend the stay order of June 2, 1965, issued by Associate Justice Douglas of the Supreme Court of the United States, may more appropriately be directed to that court or a justice thereof.

Traynor
Chief Justice

EXHIBIT B

Supreme Court of the United States. No. ....., October Term, 1965.

Northwestern Pacific Railroad Company, Appellant, v. Public Utilities Commission of the State of California.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant, and of the opposition of the appellee thereto,

IT IS ORDERED that the time for docketing the case in the above-captioned cause be, and the same is hereby, extended to and including October 16, 1965.

John M. Harlan
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of September, 1965.

BLANK
PAGE

BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
NOV 15 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California

Motion to Dismiss or Affirm

MARY MORAN PAJALICH
RODERICK B. CASSIDY
HECTOR ANNINOS
5072 State Building
San Francisco, California 94102

Attorneys for the Public Utilities Commission of California and the People of the State of California, Appellees.

Dated: November 12, 1965

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

BLANK
PAGE

SUBJECT INDEX

	Page
Statement	1
Argument	5
The California Commission Acted Lawfully in Ordering Reconstruction of the Tunnel	7
The Order Requiring Restoration of the Service Existing Prior to the Fire Is Lawful	10
NWP's Argument That the Supreme Court of California and the California Commission Must Review Evidence of the Flood Damage Is Not Only Erroneous but Inconsistent	11
The Abandonment Sections of the Interstate Commerce Act Do Not Deprive the California Commission of Its Jurisdiction to Order Repair of NWP's Facilities	12
The Record	15
Conclusion	17
Appendices	

TABLE OF AUTHORITIES CITED

Cases	Pages
Atchison T. & S.F. Ry. Co. v. Railroad Commission, 283 U.S. 380; 75 L. ed. 1128 (1931)	9
Atchison, Topeka and Santa Fe Ry. Co. v. Railroad Commission, 209 Cal. 460 (1930)	9
Colorado v. United States, 271 U.S. 153, 70 L. ed. 878 (1925)	6
Interstate Commerce Commission v. United States, 280 U.S. 52; 74 L. ed. 163 (1929)	9
McGrody v. Baltimore and Ohio Railroad Co., 217 F.Supp. 252 (1963)	13
Myers v. Arkansas & Ozarks Ry. Corp., 185 F.Supp. 36 (1960)	13
Northwestern Pacific Railroad Co. v. Interstate Commerce Commission, et al., October Term, 1964, No. 381, 379 U.S. 132; 13 L. ed 2d 333	3, 16
Northwestern Pacific R.R. Co. v. United States, 228 F. Supp. 690 (1964)	2
Re Summers, 325 U.S. 561 (1945)	15
Smith v. United States, 211 F.Supp. 66 (1962)	14
Zirn v. Hanover Bank, 215 F.2d 63 (1954)	14

Statutes	
California Public Utilities Code:	
Section 761	10
Section 762	7, 8, 9, 15
Interstate Commerce Act:	
Section 1(10)	12
Section 1(18)	2, 6, 8, 12
Section 1(19)	13
Section 1(20)	12, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California

Motion to Dismiss or Affirm

Appellee, the Public Utilities Commission of the State of California, moves to dismiss or affirm on the grounds that the question presented is so unsubstantial as not to need further argument.

STATEMENT

The Northwestern Pacific Railroad Company (hereinafter referred to as NWP) is a railroad corporation, a common carrier, and a public utility as those terms are defined in the Constitution of the State of California and in the Public Utilities Act of California, and as such is subject to the regulatory jurisdiction of the California Public Utilities Commission. On July 20, 1961, NWP's Puerto Suello

tunnel was heavily damaged by fire. Cave-ins closed the tunnel portals and thus cut NWP's main line at a point just north of San Rafael, California.[1] Instead of taking immediate steps to repair the tunnel and restore service, NWP filed an application with the Interstate Commerce Commission (hereinafter referred to as ICC) asking for a certificate of public convenience and necessity permitting abandonment (Section 1(18) of the Interstate Commerce Act) of a two and one-half mile segment of line, on a part of which the tunnel is located. After ten days of hearing in 1962 before the ICC in Finance Docket No. 21725, extensive briefs, a recommended report and order by the hearing examiner recommending denial of authority to abandon, exceptions to the recommended report and replies thereto, and oral argument before the ICC in 1963, the ICC issued its decision (320 ICC 19 (1963)) accepting the recommendations of the hearing examiner and denying the certificate authorizing abandoment.

After exhausting administrative remedies before the ICC the NWP appealed the decision to a three-judge federal district court in San Francisco in July, 1963, where the matter was extensively briefed and argued. The district court dismissed the appeal and affirmed the order of the ICC. (*Northwestern Pacific R.R. Co. v. United States,* 228 F. Supp. 690 (1964)). One month later, May 19, 1964, the NWP had still made no move to rebuild the tunnel and reopen their main line to traffic. Since the ICC decision only denied the application for authority to abandon and did not affirmatively order reconstruction of the tunnel, the California Commission issued an order instituting investigation in Case No. 7907, and hearing thereon was had in June,

1. See map attached as Appendix A. The Puerto Suello tunnel is identified thereon as Tunnel No. 4.

1964. On August 10, 1964, the NWP filed its second application with the ICC, again seeking authority to abandon the tunnel (F.D. 23249). Three days later, August 13, 1964, NWP filed an appeal with the United States Supreme Court seeking review of the judgment of the three-judge district court affirming the decision of the ICC in Finance Docket No. 21725. (*Northwestern Pacific Railroad Co. v. Interstate Commerce Commission, et al.*, October Term, 1964, No. 381.) Motions to affirm were filed by the United States, the ICC, the California Commission, the Atchison, Topeka and Santa Fe Ry. Co. (hereinafter referred to as Santa Fe), and by counsel representing the County of Marin and several cities and shippers in said County (hereinafter collectively referred to as the Marin County parties).

During the pendency of the appeal to the United States Supreme Court of the ICC decision in Finance Docket No. 21725, the California Commission issued Decision No. 67889 in Case No. 7907 on September 22, 1965. That decision by the California Commission, affirmatively ordering reconstruction of the tunnel, is the subject of the instant appeal and is attached to the Jurisdictional Statement as Appendix C. On November 23, 1964, the United States Supreme Court affirmed the judgment of the three-judge district court and the ICC decision in Finance Docket No. 21725. (*Northwestern Pacific R.R. Co. v. ICC,* 379 U.S. 132; 13 L. ed. 2d 333). On January 18, 1965, the Supreme Court of the United States denied rehearing.

After the filing by NWP on August 10, 1964, of its second attempt to secure ICC approval of the tunnel abandonment (F.D. 23249), the California Commission, Santa Fe and the Marin County parties moved the ICC to dismiss the second application on the grounds that the issues relative to the tunnel had already been recently adjudicated in Finance Docket No. 21725, which matter was still then on appeal.

The motions to dismiss were denied by the assigned ICC commissioner on December 10, 1964. On February 1, 1965, the California Commission, the Santa Fe and the Marin County parties petitioned the ICC for reconsideration of the order denying motions to dismiss. On March 24, 1965, Division 3 of the ICC, acting as an Appellate Division, issued its order (attached hereto as Appendix B) vacating and setting aside the order of December 10, 1964 and dismissing the new application in Finance Docket No. 23249. The NWP thereupon, on April 28, 1965, petitioned for rehearing of the order of dismissal of March 24, 1965. On July 29, 1965, Division 3 of the ICC vacated and set aside the order of dismissal of March 24, 1965, and directed that Finance Docket No. 23249 be set for hearing. Thereafter, in August, 1965, the California Commission, the Santa Fe and the Marin County parties filed extraordinary petitions for relief under Rule 1.102 of the ICC's General Rules of Practice asking that the ICC review its order of July 29, 1965 which reinstated Finance Docket No. 23249 for hearing. The scheduled hearings of Finance Docket No. 23249, originally set for February 1, 1965 were continued to October 18, 1965, as set forth at page 7 of the Jurisdictional Statement. However, by telegram dated October 14, 1965, the ICC advised that the hearings were "postponed indefinitely pending further order of the Commission". The present state of Finance Docket No. 23249, then, is that the aforesaid extraordinary petitions for relief are still under consideration by the ICC and the hearings are postponed indefinitely.

Meanwhile, in Decision No. 67889 of the California Commission, NWP filed a petition for writ of review with the Supreme Court of California (S.F. No. 21861). That petition and a subsequent petition for rehearing were denied. (Appendices A and B to Jurisdictional Statement). On

September 13, 1965, NWP filed with the Supreme Court of California a Petition for Writ of Mandate (S.F. No. 22132) requesting the Supreme Court of California to direct the California Commission to certify to the United States Supreme Court portions of the record made before the California Commission in Case No. 7907 which had not been placed before the Supreme Court of California by NWP when it filed its petition for writ of review of the California Commission's Decision No. 67889. The Petition for Writ of Mandate was denied on September 13, 1965. The Petition for Rehearing thereof, described as still pending at pages 19 and 23 of the Jurisdictional Statement, was denied by the Supreme Court of California on October 13, 1965.

ARGUMENT

Certain unusual aspects of NWP's attempts to abandon the Puerto Suello tunnel should be brought to this Court's attention. They will serve to explain the long and tortuous history of the proceeding, before the ICC, the California Commission and the courts, as set forth above. The NWP is a wholly-owned subsidiary of the Southern Pacific Company (hereinafter referred to as SP). As will be observed from the attached map, Appendix A, the NWP connects with the SP at Schellville, California, on one route and in the alternative at Tiburon, California, with SP's arch rival, the Santa Fe. Upon collapse of the tunnel, traffic formerly routed by shippers over the NWP via the Tiburon route and thence over the Santa Fe lines to the south and east, had to move of necessity via Schellville and over the SP.

At the ICC hearings in Finance Docket No. 21725, NWP's own evidence clearly showed that NWP would be much better off financially if it rebuilt the tunnel, reopened its main line, and resumed the prior service than if it were successful in keeping the tunnel closed. This fact was made

clear by the ICC in its decision in Finance Docket No. 21725 and at no time has it been disputed by NWP. The reason for the apparent self-defeating proposal to abandon made by NWP is that the move is dictated by the best interests of NWP's parent, the SP. NWP's own evidence in Finance Docket No. 21725 showed that SP would gain more revenue as a result of traffic diverted from the rival Santa Fe to the SP than SP's subsidiary would lose because of the tunnel closing. Thus the tunnel fire, rather than being a disaster, was an unexpected stroke of good fortune for the SP. The traffic diversions which have continued now for more than four years put time and delay on the side of the SP and explain why it is utilizing every possible tactic in the administrative and judicial processes to keep the tunnel closed and continue the windfall.

In the usual abandonment proposal the service remains in operation during the ICC proceedings and any judicial action thereafter. The public continues to enjoy the use and availability of the service until the controversy is finally decided. Here, because of an unfortunate act of arson by juveniles, a *de facto* abandonment occurred in the beginning and while the SP profits from traffic diversions the public has been and is denied service through the tunnel. The California Commission feels strongly that these circumstances explain the long succession of appeals and delays by NWP in an abandonment proposal which, on its face, was totally devoid of merit. Section 1(18) of the Interstate Commerce Act established as the only test in authorizing abandonments "the present or future public convenience and necessity." In *Colorado v. United States,* 271 U.S. 153, 70 L. ed. 878 (1925), it was made clear that the objective of the section was the protection of interstate commerce from undue burdens and not the enhancement of profits of one railroad at the expense of a competing line.

When it appeared that the possibilities for delay in appeals from Finance Docket No. 21725 were nearing an end, the NWP thereupon attempted to start the whole cycle anew by filing again with the ICC in Finance Docket No. 23249 on the basis of a claimed change in conditions. We are confident that the ICC, which in its last act herein on October 14, 1965, cancelled the October 18th hearing and postponed the new application "indefinitely" will not permit the NWP to continue its dilatory tactics.

The California Commission Acted Lawfully in Ordering Reconstruction of the Tunnel

At the hearing of Case No. 7907 the California Commission proceeded under Section 762 of the California Public Utilities Code, as follows:

> "Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has

> been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured."

The significant language for our purposes here is "to promote the security or convenience of . . . . the public, or in any other way to secure adequate service or facilities . . . ." It was obvious that a determination under such statutory language would be nothing more than a reconsideration of the same issues determined by the ICC in Finance Docket No. 21725. The California Commission agrees with NWP's statement that the ICC has exclusive jurisdiction over abandonments. In finding that the present and future public convenience and necessity were not shown to permit abandonment, the ICC necessarily found that the tunnel was needed for the "convenience of the public" and "to secure adequate service". The California Commission did not have the power to decide the issue of public convenience under Section 762 in a manner inconsistent with the finding of the ICC on present and future public convenience and necessity under Section 1(18) of the Interstate Commerce Act.

At the hearing, the ICC examiner's recommended report and order, the decision of the ICC in Finance Docket No. 21725 and the decision of the three-judge court affirming the ICC were officially noted and received in evidence. When counsel for NWP attempted to introduce evidence and testimony intended to establish that there was no public need for the tunnel, the presiding commissioner would not permit such attempt, stating that the California Commission had no intention of retrying issues already decided by the ICC. In its Decision No. 67889 the California Commission set forth and accepted the prior determination of

the ICC on the issue of public convenience and added that it will act only to *supplement* what the ICC has done by affirmatively ordering repair of a tunnel for which the ICC has declared there is a public need. In so ordering the California Commission has authority under Section 762 and the Union Station cases set forth in Decision No. 67889. All the evidence that was necessary to support an order requiring repair of facilities under Section 762, was (1) a showing that certain facilities or structures were in a state of disrepair and (2) that said facilities or structures were needed for the convenience of the public. The first requisite was met by testimony of a California Commission engineer. As to the second, the California Commission accepted the finding of the ICC, not on the theory of *res judicata* as claimed at page 18 of the Jurisdictional Statement, but rather, in recognition of the rule of federal supremacy.

The effect and significance of the Union Station cases (*Interstate Commerce Commission v. United States,* 280 U.S. 52, 62; 74 L. ed. 163 (1929); *Atchison T. & S.F. Ry. Co. v. Railroad Commission,* 283 U.S. 380; 75 L. ed. 1128 (1931); see also *Atchison, Topeka and Santa Fe Ry. Co. v. Railroad Commission,* 209 Cal. 460 (1930)) is set forth in detail in Decision No. 67889. Briefly, they establish limitations to the ICC's abandonment jurisdiction in holding that the ICC cannot affirmatively order construction coincident therewith, while at the same time defining limitations to the powers of the California Commission to prevent encroachment upon the abandonment jurisdiction of the ICC. The net effect insofar as the instant proceeding is concerned is that the ICC's jurisdiction with respect to abandonment may be supplemented by the jurisdiction of the California Commission to require construction and repair of facilities and structures. The acts of the ICC and the California

Commission were complementary, valid, and the only way in which the public interest could be served in the unusual circumstances of this proceeding.

The Order Requiring Restoration of the Service Existing Prior to the Fire Is Lawful

At pages 14 and 15 the Jurisdictional Statement complains of that portion of the order in Decision No. 67889 which requires NWP, upon repair of the tunnel, to restore the same level of service which existed prior to the fire. The objections are based upon Section 761 of the California Public Utilities Code.[2]

It is submitted that Section 761 requires a hearing in those situations where the California Commission would require a level of service different from that which had theretofore existed. In its decision the California Commission ordered no change. It required only a restoration of the exact quantity and quality of service which had existed prior to the fire. With the tunnel closed for several years it is difficult to see how any determination of a level of service different from that which pre-existed could be arrived at without resort to speculation and conjecture. If a change in the level of service is justified, it can only await repair of the tunnel and restoration of service in order that the

2. "761. Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

volume of traffic can be ascertained under then current conditions. If a change then appears warranted, it can be accomplished under the usual procedures. In view of NWP's history of delay and its clear motives of continuing on behalf of its parent SP, at all cost to NWP, the existing diversion of traffic from Santa Fe, it could be expected that if the decision had made no order with respect to restoring train service, the NWP would rebuild the tunnel but operate no trains over the route. This would necessitate, to NWP's satisfaction, another formal proceeding before the California Commission, another decision, and with successive appeals therefrom terminating eventually again with this Court, additional years of delay and continued windfall to SP at the expense of the Santa Fe, not to mention inconvenience to the shipping public, would result.

The issue in this proceeding is whether or not the tunnel should be repaired. The matter of service had been injected as a diversionary tactic. Even if the Court should see merit in the service issue, the portion of the order requiring repair of the tunnel should be sustained.

NWP's Argument That the Supreme Court of California and the California Commission Must Review Evidence of the Flood Damage Is Not Only Erroneous but Inconsistent

NWP argues (Jurisdictional Statement, pp. 13-14) that evidence of the flood damage sustained in the winter of 1964-1965, after the hearing in Case No. 7907 and issuance of Decision No. 67889, should be considered by both the Supreme Court of California and by the California Commission. The theory apparently is that if this were done, the Supreme Court of California and this Commission would conclude that in the circumstances public convenience and necessity require that the tunnel abandonment be allowed. The defect in this argument is, of course, obvious.

As NWP itself states, only the ICC has jurisdiction to weigh the evidence and resolve the issue of whether public convenience and necessity permit the abandonment.

The NWP is most deceptive in complaining of the flood loss, its adverse effect on NWP's net profits, and urging this as evidence justifying abandonment. NWP neglects to mention that its own evidence in Finance Docket No. 21725 showed that NWP itself would be better off financially to a most substantial degree if the tunnel were rebuilt and the main line restored to operation. The core of this entire dispute is that NWP's parent, the SP, as a result of the tunnel closing, gains more by diversions from Santa Fe than the NWP loses. This was so found by both the recommended report and order of the hearing examiner and by the ICC decision in Finance Docket No. 21725 (320 ICC 19). At page 20 the decision adopted as its own the findings and conclusions of the examiner. The result is that abandonment of the tunnel could not in any respect assist or improve NWP's claimed "sub-marginal net profit." The truth is the opposite—reconstruction of the tunnel would *improve* NWP's profits. Collaterally, of course, it would affect SP's profits adversely since the diversions from Santa Fe would cease. But SP has never been a party in any of these proceedings. Its profits have never been in issue and could not even remotely justify a finding that public convenience and necessity permit abandonment of a portion of NWP's line.

The Abandoment Sections of the Interstate Commerce Act Do Not Deprive the California Commission of Its Jurisdiction to Order Repair of NWP's Facilities

It is stated repeatedly throughout the Jurisdictional Statement that under Section 1(20) of the Interstate Commerce Act the federal district courts have "exclusive" jurisdiction to enjoin any act contrary to Sections 1(18) (19)

and (20). We would point out first that district courts are not specifically named in Section 1(20), but that reference is made to "any court of competent jurisdiction." We agree, of course, that a federal district court qualifies as a court of competent jurisdiction, but there is nothing, either in the statute or the cases cited by NWP, to support any inference that the district court's jurisdiction in this respect is exclusive.

A reading of Sections 1(18) (19) and (20) reveals without doubt that what was contemplated in Section 1(20) was *affirmative* action by a railroad to effect an abandonment without first having secured certificate authority from the ICC. Such affirmative action in violation of the statutes may be enjoined as provided. In the instant proceeding NWP undertook no affirmative action to effect an abandonment which could be enjoined. NWP's sin is one of omission in that it failed to take affirmative action to overcome an unauthorized *de facto* abandonment created by acts of other parties. In these circumstances it is questionable whether Section 1(20) gives jurisdiction even to a federal district court to grant injunctive relief which is mandatory rather than merely prohibitive. Substantial authority has established that there is no "abandonment" within the meaning of the Interstate Commerce Act where cessation of operations results not from volition of the railroad, but from conditions over which the railroad had no control.

In two recent cases in which injunctive relief was sought in federal district courts under the provisions of Section 1(20), such relief was denied on that basis. In *Myers v. Arkansas & Ozarks Ry. Corp.*, 185 F.Supp. 36, 41 (1960) it was so held when heavy rains and floods damaged portions of a line and certain bridges. In *McGrody v. Baltimore and Ohio Railroad Co.*, 217 F.Supp. 252 (1963) the

railroad halted operation of a river tugboat and carfloat service when the last two shippers utilizing the service moved to other locations and there were no further calls for such service. Plaintiffs were a labor union concerned with lost jobs, seeking an injunction under Section 1(20). That court also strictly construed the abandonment sections and found there was no "abandonment", but merely a cessation of operations where there was no demand for the service and where the railroad's tariff was still in effect, and the railroad held itself out to the public as ready to perform the service if there was any demand. In this regard, see also: *Smith v. United States,* 211 F.Supp. 66 (1962) at page 69; and *Zirn v. Hanover Bank,* 215 F.2d 63 (1954) at page 69.

It is evident from the above cases that injunctive relief under Section 1(20) is strictly construed by the federal courts, probably in part under the general view prevailing that such relief is summary, peculiar and extraordinary in nature and should not be granted in doubtful cases, but only where the right thereto is clear. Since there was no voluntary act of abandonment by NWP here, but rather a condition resulting from the acts of third persons over whom the NWP had no control, and because NWP still maintains its tariffs on file with this Commission for service through the tunnel and can claim only a temporary cessation of operations, it is submitted that any attempt to secure affirmative injunctive relief in a district court requiring NWP to expend some $850,000[3] to reconstruct a

3. The ICC found that the cost of reconstruction would be $851,655, but the decision in Finance Docket No. 21725 notes that NWP collected $200,720 in insurance on a $500,000 deductible policy. The actual out-of-pocket cost to NWP would be further reduced by certain income tax savings, i.e. deduction resulting from casualty loss not compensated by insurance.

tunnel would meet with failure. It is the opinion of the California Commission that the only relief available to the long-suffering shipping public of California is that provided for in Decision No. 67889, as authorized by Section 762.

The Record

NWP asks that the California Commission be required by this Court to certify for transmission to the Court the record made before the Commission in Case No. 7907. California statutes provide for review of decisions of the California Commission by the Supreme Court of California by way of petition for writ of certiorari or review. (See statutes set forth at page 20 of Jurisdictional Statement). If the writ issues the Commission is *then* directed to certify its record in the case to the Supreme Court of California. Since the California Court declined to issue the writ, the only portions of the record before that court are whatever NWP deemed important enough to append to its petition for writ of review.

It is the position of the California Commission that the record on review to the Supreme Court of the United States should be no more than was before the Supreme Court of California. NWP has not cited to this Commission any convincing authority to support its view. In the Jurisdictional Statement NWP refers to the requirements of the Revised Rules of the Supreme Court of the United States, but no specific rule is identified. The cited case of *Re Summers,* 325 U.S. 561, 563 (1945), is not in point. It involves a petition for a writ of certiorari to review the action of the Supreme Court of Illinois in denying petitioner's prayer for admission to practice law in Illinois. It appears that the record in question there was made in the Supreme Court of Illinois. There was no original forum below, court or administrative agency, and no petition for writ of review

procedure to the state supreme court. The record brought up to this Court was that which was before the Supreme Court of Illinois. This, in essence, is what we urge should result in the instant proceeding.

The petition for writ of mandate referred to at page 19 of the Jurisdictional Statement has been denied by the California Supreme Court. The petition for rehearing thereof, described as still pending, was denied October 13, 1965. Again, in seeking to bring before this Court the entire record made before the California Commission in one-half day of hearing, NWP is prompted only by motives of creating delay and diversion. Nowhere does it attempt to state what is in the record that could assist NWP in this Court. The record consists in part of transcript in which counsel for NWP is primarily engaged in an unsuccessful attempt to retry before the California Commission the issue of the need for the tunnel, which issue had already been decided by the ICC in Finance Docket No. 21725 and which the California Commission has no jurisdiction to pass upon. Of the exhibits, most were introduced for identification by NWP but not received in evidence by the Commission since they also were directed to the question of public need for the tunnel. One of these, Exhibit No. 16 for identification, consists of the entire transcript (10 volumes) of the hearings before the ICC in Finance Docket No. 21725. This Court has already passed upon the ICC decision in Finance Docket No. 21725 and upheld the conclusion that public convenience and necessity require continued operation through the tunnel. (*Northwestern Pacific Railroad Co. v. Interstate Commerce Commission, et al.*, October Term, 1964, No. 381, 379 U.S. 132; 13 L. ed 2d 333.)

Appellant NWP has had long experience before this Commission and in appeals from decisions of this Commis-

sion. Appelant is quite aware that the record in proceedings had before the California Commission are not brought up to the Supreme Court of California unless the petition for writ of review is granted. This is not to say that a litigant is foreclosed by such a procedure. As NWP also knows full well, it is free to attach as an appendix to a petition for writ of review addressed to the Supreme Court of California all or any part of the record made before the California Commission so as to assure its consideration by the California Court and its inclusion in the record on appeal in the event the petition for writ is denied.

CONCLUSION

The unusual fact situation here—obviously not contemplated by the abandonment sections of the Interstate Commerce Act despite their having been designed for the protection of the public—is being cynically used by the NWP and the SP so to perpetuate a diversion of traffic from a competitor. After four and one-half years of frustration and delay the public is entitled to a final resolution. The opinion of the Supreme Court of California should be affirmed.

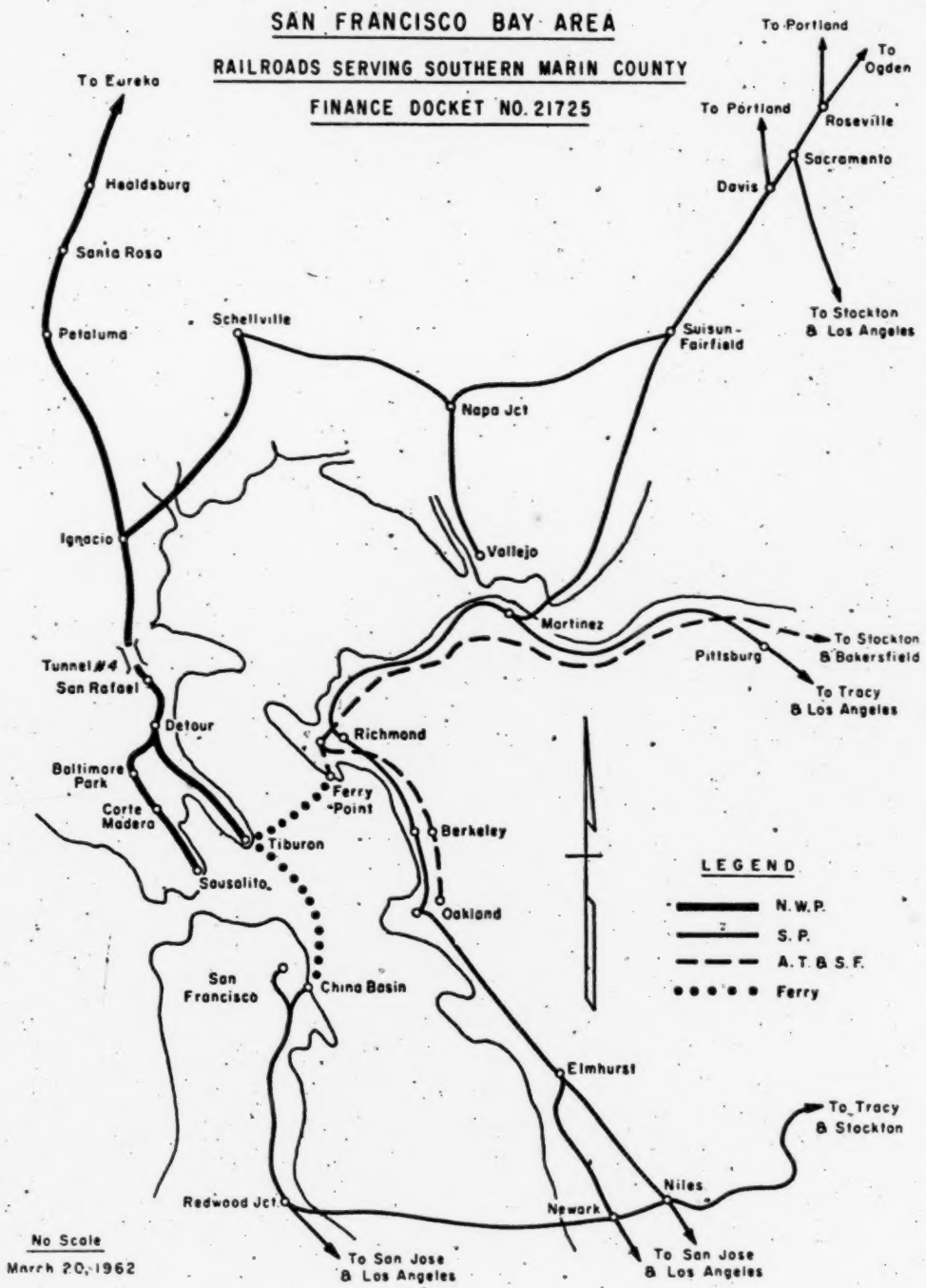
MARY MORAN PAJALICH
RODERICK B. CASSIDY
HECTOR ANNINOS
5072 State Building
San Francisco, California 94102

Attorneys for the Public Utilities Commission of California and the People of the State of California, Appellees.

(Appendices Follow)

BLANK
PAGE

Appendix A


SAN FRANCISCO BAY AREA
RAILROADS SERVING SOUTHERN MARIN COUNTY
FINANCE DOCKET NO. 21725
To Eureka
Healdsburg
Santa Rosa
Petaluma
Schellville
Ignacio
Tunnel #4
San Rafael
Detour
Baltimore Park
Corte Madera
Tiburon
Sausalito
Napa Jct
Vallejo
Suisun-Fairfield
To Portland
To Ogden
To Portland
Roseville
Sacramento
Davis
To Stockton & Los Angeles
Martinez
Pittsburg
To Stockton & Bakersfield
To Tracy & Los Angeles
Richmond
Ferry Point
Berkeley
Oakland
San Francisco
China Basin
Elmhurst
To Tracy & Stockton
Niles
Newark
Redwood Jct.
To San Jose & Los Angeles
To San Jose & Los Angeles
LEGEND
N.W.P.
S.P.
A.T.&S.F.
Ferry
No Scale
March 20, 1962

Appendix B

Service Date
March 30, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of March, A. D. 1965.

Finance Docket No. 23249

NORTHWESTERN PACIFIC RAILROAD COMPANY ABANDONMENT IN MARIN AND SAN FRANCISCO COUNTIES, CALIF.

Upon consideration of the record in the above-entitled proceeding, and of petitions of the Public Utilities Commission of the State of California, The Atchison, Topeka and Santa Fe Railway Company, and of other protestants, representing several communities and shippers in the immediate area, for reconsideration of the Commission's order of December 10, 1964, denying their motions to dismiss the application of the Northwestern Pacific Railroad Company under sections 1(18)-(20) for authority to abandon (a) a portion of the Sausalito Branch, (b) a portion of the main line between San Rafael and Forbes Overhead, together with all sidings, spur tracks and appurtenances, and (c) alternatively, or in the event the Commission denies this application as to (b), to abandon a portion of the main line between Meadowsweet and San Francisco, involving 4.5 miles of main line railroad and 5 miles of ferry route, all in Marin and San Francisco Counties, Calif., as described more fully in the application; and

It appearing, That on appeal in *Northwestern Pacific R. Co. v. Interstate Commission* et al., U. S. , the United States Supreme Court by per curiam opinion of November 23, 1964, affirmed the judgment of the United States District Court for the Northern District of California, and subsequently denied petition for rehearing in the matter on January 18, 1965, thus sustaining the lower court's conclusion (228 F. Supp. 690) that there is substantial evidence to support the Commission's denial of the abandonment application in *Northwestern Pac. R. Co. Abandonment,* 320 I.C.C. 19, involving the Puerto Suello Tunnel; that similarly in *Northwestern Pac. R. Co. Abandonment,* 312 I.C.C. 783, authority to abandon said portion of the Sausalito Branch line, was denied by the Commission; that the Commission's findings of facts in these proceedings are conclusive; that by instant application filed August 10, 1964, applicant seeks authorization to abandon the same portions of its line, including the Puerto Suello Tunnel and Sausalito Branch segments, as were embraced in the previous applications, which have been denied; that the alternative authorization sought involves rail lines and areas of service which were an integral part of the matters fully considered in the said prior applications; that in the light of these circumstances the decrease in rail freight volume of several shippers on the branch line and the relocation of a few of the companies, upon which grounds consideration is urged, do not constitute substantial changed conditions of such scope and substance, nor has applicant presented any other material fact or argument, to warrant consideration of the abandonment application filed August 10, 1964:

It is ordered, That upon reconsideration, the order of December 10, 1964, be, and it is hereby, vacated and set aside; and

It is further ordered, That the said application be, and it is hereby, dismissed.

By the Commission, Division 3, acting as an Appellate Division.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

BLANK
PAGE

BLANK
PAGE

BLANK
PAGE

Subject Index

	Page
Statement	2
Argument	5
1. The California Public Utilities Commission had jurisdiction to make its order requiring repair of the tunnel and restoration of former rail service	5
2. Alleged storm damage is not a proper issue	13
3. The order of the California Public Utilities Commission requiring restoration of former rail service presents no substantial federal question	14
4. Proceedings in Interstate Commerce Commission Finance Docket No. 23249 are not material to this appeal	17
5. The Public Utilities Commission had no obligation to stay its hand simply because the NWP had filed a new application to abandon	19
6. Whether the findings of the Interstate Commerce Commission are res judicata is immaterial	20
Conclusion	22

Table of Authorities Cited

Cases	Pages
Atchison, T. & S.F.R.Co. v. Railroad Commission, 283 U.S. 380 (1931)	5, 6, 11, 20
Chicago, M., St. P. & P.R.Co. v. Northern Pacific R. Co., 120 F.Supp. 710 (W.D. Wash. 1954), affirmed 225 F.2d 840 (CA9 1955)	7
Colorado v. United States, 271 U.S. 153 (1926)	7, 8
Edward T. Molitor, 64 Cal. PUC 109 (1965)	14
Gilmore v. Sandersville R.Co., 149 F.Supp. 725 (M.D. Ga. 1955)	7
Interstate Commerce Commission v. United States, 280 U.S. 52 (1929)	5, 6, 11, 20
Myers v. Arkansas & Ozarks Railway Corp., 185 F.Supp. 36 (W.D.Ark. 1960)	18
Myers v. Famous Realty, Inc., 271 F.2d 811 (CA2 1959)	10

Pages

National Fire Insurance Co. v. Thompson, 281 U.S. 331 (1930) 16

Northwestern Pacific Railroad Company—Abandonment between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, California, 320 ICC 19 (1963) 2

Northwestern Pacific Railroad Company v. Interstate Commerce Commission, et al., October Term, 1964, No. 381, 379 U.S. 132 (1964) 2

Northwestern Pacific Railroad Company v. United States of America, et al., 228 F.Supp. 690 (1964) 2, 13

People v. Western Airlines, Inc., 42 Cal.2d 621, 268 P.2d 723 (1954), appeal dismissed, 348 U.S. 859 15

Powell v. United States, 300 U.S. 276 (1937) 11

Railroad Commission v. Southern Pacific Co., 264 U.S. 331 (1924) 5, 6, 11, 20

Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793 (1945) 15

Scripto v. Carson, 362 U.S. 207 (1960) 15

Speiser v. Randall, 357 U.S. 513 (1958) 15

St. Louis S.W.R.Co. v. Mo.Pac.R.Co., 289 U.S. 76 (1933) .. 11

Texas & P.R. Co. v. Gulf, C. & S.F.R.Co., 270 U.S. 266 (1926) 7, 10

Village of Mantorville v. Chicago Great Western R. Co., 8 F.Supp. 791 (D.Minn. 1934) 10

Codes

Public Utilities Code:

Section 761 15

Section 1708 ..... 4, 14

Section 1757 13

Rules

Rules of the Supreme Court of the United States (Revised), Rule 10 1

Statutes

Interstate Commerce Act (49 U.S.C.):

Sections 1(18)-1(21) 19

Section 1(20) 5, 6, 7, 9, 10, 12, 18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 676

NORTHWESTERN RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
and
CITY OF SAN RAFAEL, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO AFFIRM

Appellees City of San Rafael, et al., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the decision of the Supreme Court of the State of California, denying petition for writ

of review of the decision of the Public Utilities Commission of California, be affirmed on the ground that the questions presented are so insubstantial as not to warrant further argument.

STATEMENT

On November 23, 1964, this Court affirmed the decision of a three-judge Federal District Court in the Northern Division of California which had in turn sustained an order of the Interstate Commerce Commission denying authority to appellant Northwestern Pacific Railroad Company (hereinafter referred to as NWP) to abandon the Puerto Suello Tunnel on its main line near San Rafael, California. *Northwestern Pacific Railroad Company v. Interstate Commerce Commission, et al.*, October Term, 1964, No. 381, 379 U.S. 132 (1964), affirming *Northwestern Pacific Railroad Company v. United States of America, et al.*, 228 F.Supp. 690 (1964). The decision of the Interstate Commerce Commission was reported under the name *Northwestern Pacific Railroad Company—Abandonment between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, California,* 320 ICC 19 (1963).

The Puerto Suello Tunnel has been abandoned *de facto* since it was damaged by fire on July 20, 1961.

Following the aforementioned Federal District Court decision upholding the Interstate Commerce Commission, the Public Utilities Commission of the State of California (hereinafter referred to as PUC) instituted an investigation which, following a hearing and the filing of briefs, culminated in a PUC order of September 22, 1964, requiring appellant to repair the tunnel and restore the

same rail service via the tunnel as was provided prior to the fire. The PUC order is set forth as Appendix C of the Jurisdictional Statement. It is reported at 63 Cal. PUC 368.

The PUC's order was issued for the express purpose of supplementing and implementing the Interstate Commerce Commission's order denying a certificate to abandon. The PUC acted after concluding that the NWP would likely continue to delay reconstruction of the tunnel even after affirmance by this Court of the ICC's determination unless there were an affirmative order to reconstruct. (This Court did subsequently affirm the ICC's determination, as pointed out above; as the PUC anticipated, NWP has ignored the ICC's determination and has kept the tunnel closed.)

NWP filed a petition for writ of review of the PUC decision with the Supreme Court of the State of California. Following the filing of answers by appellees PUC and City of San Rafael, et al., the petition was denied on March 10, 1965 (S.F. No. 21861). Rehearing was denied on April 21, 1965.

On August 10, 1964, NWP, while continuing to ignore its obligation as already determined by the ICC and as then affirmed by the Federal District Court, filed a new application for authority to abandon the same line of railroad. Finance Docket No. 23249. While NWP asserts in its Jurisdictional Statement that motions to dismiss such new application have finally been denied, and that hearings are scheduled, the facts are otherwise. Hearing has been postponed indefinitely, and motions to dismiss are under consideration.

Appellant's Jurisdictional Statement, page 9, page 12-14, discusses certain alleged storm damages incurred by appellant on a portion of its line not involved in the instant case in Christmas week of 1964. Appellant has improperly raised the question of those damages before this Court. While the storm occurred after appellant had filed its petition for writ of review with the California Supreme Court, the matter was pending before that court long after the claimed damage and yet appellant did nothing to bring it to the attention of that court until some time after that Court had denied review. Also appellant did nothing at any time to bring any contention of storm damage before the PUC although being well aware that the PUC "may at any time . . . rescind, alter or amend any order or decision made by it". California Public Utilities Code, Section 1708.

Reference to the alleged storm damage in appellant's Statement of Facts, and in the body of appellant's Jurisdictional Statement, is improperly presented before this Court, since the storm damage was not raised below in a timely fashion.

The Argument which follows considers the appellant's "Questions Presented" in the order in which appellant lists them. Appellant has not presented any substantial federal question.

ARGUMENT

1. THE CALIFORNIA PUBLIC UTILITIES COMMISSION HAD JURISDICTION TO MAKE ITS ORDER REQUIRING REPAIR OF THE TUNNEL AND RESTORATION OF FORMER RAIL SERVICE

Section 1(20) of the Interstate Commerce Act, 49 U.S.C. Section 1(20), contains no language indicating that the remedy it provides for an illegal abandonment is exclusive. Appellant's construction of Section 1(20) must therefore be by implication. No such implication arises by virtue of the purpose of Section 1(20).

There is absolutely no conflict between the scheme of regulation created by Congress and the action taken here by the California Public Utilities Commission. The PUC acted in congruence with the Interstate Commerce Commission's determination that public convenience and necessity do not permit abandonment of the tunnel. This mode of procedure was upheld in the Los Angeles *Union Terminal* cases.[1]

In the *Union Terminal* cases the Interstate Commerce Commission considered the question of public convenience and necessity as it concerned interstate commerce, and issued certificates permitting the extensions and abandonments which were required in connection with the construction of the Union passenger station. Then, the California Commission affirmatively ordered the railroads to take physical action in conformity with the findings of the Interstate Commerce Commission. This Court held

---

[1] *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331 (1924);
Interstate Commerce Commission v. United States, 280 U.S. 52 (1929);
Atchison, T. & S.F.R.Co. v. Railroad Commission, 283 U.S. 380 (1931).

that this complementary act of the California Commission did not conflict with federal law:

> ". . . [T]he intention to supersede the exercise by the state of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the state [citations]. We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained, and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act." *Atchison, T. & S.F.R.Co. v. Railroad Commission,* 283 U.S. 380, 392-393 (1931).

In this case, as in the *Union Terminal* cases, all the issues of federal law have been fully heard. The PUC acted within its sphere of authority simply to bring about the situation which the Interstate Commerce Commission had found to be required by public convenience and necessity.

It is true that in the instant case, unlike the *Union Terminal* cases, a federal remedy exists in the form of a suit for injunction under Section 1(20) of the Interstate Commerce Act. However, no reason can be put forward for reading that section as preempting the power of state commissions to act in concert with the Interstate Commerce Commission.

In a proceeding for an injunction,

> "[t]he function of the court . . . is to construe a statutory provision and apply the provision as con-

> strued to the facts. The prohibition of ¶ 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction." *Texas & P.R. Co. v. Gulf, C. & S.F.R.Co.*, 270 U.S. 266, 273 (1926).

In such a proceeding, the court should not and will not hear evidence of public convenience and necessity. *Gilmore v. Sandersville R.Co.*, 149 F.Supp. 725 (M.D. Ga. 1955); *Chicago, M., St. P. & P.R.Co. v. Northern Pacific R. Co.*, 120 F.Supp. 710 (W.D. Wash. 1954), *affirmed* 225 F.2d 840 (CA9 1955). The principal issue in such litigation is whether a certificate is necessary or not, since if one is not necessary, there is no jurisdiction. If an Interstate Commerce Commission certificate is necessary for the abandonment or construction, and if it has not been issued, the court must enjoin the act complained of.

In the instant case, a certificate was necessary to permit abandonment. The Interstate Commerce Commission held that it would not issue such a certificate because there was a need for restoration of former rail service and the cost of reconstruction would not unduly burden interstate commerce. Following that decision, as affirmed by this Court, a suit for injunction could have been brought in a federal district court under Section 1(20) and such court would have had to issue such injunction. But this fact did not preclude the California Public Utilities Commission from taking action in aid of the jurisdiction of the Interstate Commerce Commission.

In the leading case of *Colorado v. United States*, 271 U.S. 153 (1926), Justice Brandeis set forth the rationale

of federal regulation of physically-intrastate railroads: "The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in the Shreveport Case [citation], a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce." 271 U.S. at 164. Under the *Colorado* rationale, an intrastate railroad line may be abandoned if its continued operation would unduly burden interstate commerce. Conversely, as in the instant case, such abandonment will not be authorized by the Interstate Commerce Commission if continued operation would not constitute an undue burden on interstate commerce. The Interstate Commerce Commission is to decide abandonment cases according to a balancing test. "The sole test prescribed is that abandonment be consistent with public convenience and necessity. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. * * * The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce." 271 U.S. at 168.

The federal scheme of regulation thus contemplates that before a line of railroad, interstate or intrastate, may be abandoned, the Interstate Commerce Commission must determine that the loss of service to local shippers is overbalanced by the burden which would be placed on interstate commerce by continued operation. When a certificate is denied by the Interstate Commerce Commission,

the federal interest has been protected. The requisite determination—that interstate commerce will not be unduly burdened by continued operation—has been made. Once that determination has been made, there is no federal interest to be served by construing Section 1(20) of the Interstate Commerce Act as preventing regulation of service by a state commission.

It cannot be said that any federal interest would be promoted by construing Section 1(20) as preventing the type of state regulation here under consideration. Indeed, such construction would tend to involve the federal district courts in the direct regulation of railroad practices, facilities, and service, a function which those courts, even in the exercise of their equity jurisdiction, are ill-equipped to undertake. Traditionally, a court of equity will not specifically enforce a contract requiring supervision over a series of continuing acts. While equity courts have in some cases enforced railway operating contracts, involvement of the federal district courts in the kind of day-to-day regulatory supervision which administrative agencies have been designed to undertake would serve no federal interest.

The decisions cited by appellant in support of its view that the PUC order encroaches upon exclusive federal jurisdiction do not in fact support that position. In general, these decisions involve the adjustment of jurisdiction as between the Interstate Commerce Commission and the federal courts, or the prevention of state action which interferes with the exclusive jurisdiction of the Interstate Commerce Commission to determine whether an abandonment will be authorized. We will discuss them only briefly.

Village of Mantorville v. Chicago Great Western R. Co., 8 F.Supp. 791 (D.Minn. 1934) held that once the Interstate Commerce Commission had granted a certificate permitting abandonment, a federal district court could not issue an injunction ordering the railroad to keep the line in service. The court pointed out that "the defendant company is asked to do that which is directly contrary to the order of the Commission." 8 F.Supp. at 794.

The dictum in *Myers v. Famous Realty, Inc.*, 271 F.2d 811, 816, n. 6 (CA2 1959), cited by appellant refers only to the situation obtaining before the railroad has applied to the Interstate Commerce Commission for a certificate of abandonment. The court said ". . . it is clear that the United States district court is the only forum having jurisdiction to prevent an illegal abandonment *begun without the institution by the carrier of a § 1(20) proceeding before the Commission.*" (Emphasis supplied.)

Texas & P.R. Co. v. Gulf, C. & S.F.R.Co., 270 U.S. 266 (1926) is also concerned with the situation before the Interstate Commerce Commission has acted. The case involved construction of an extension. The Court held that a railroad could enjoin a competitor from constructing an extension without an Interstate Commerce Commission certificate, in a federal court suit under § 1(20). In stating that the proper remedy was under § 1(20), the Court was simply pointing out that adverse parties (parties who would be protestants before the Interstate Commerce Commission if the railroad had applied for a certificate) could not themselves initiate proceedings before that Commission. The Court said, 271 U.S. at 273:

> "But a party in interest who is opposed to the construction is not authorized by the act to initiate before the Commission any proceeding concerning the project."

St. Louis S.W.R.Co. v. Mo.Pac.R.Co., 289 U.S. 76 (1933) also involved a construction situation prior to any Interstate Commerce Commission application for a certificate. The *St. Louis* decision specifically upheld the propriety of a decision by the Arkansas Commission which determined the appropriate place, manner and terms of constructing a crossing between two railroads. The Court held that the Arkansas order would not be set aside, because it did not and could not conflict with the future determination to be made by the Interstate Commerce Commission as to whether the extension which would require the crossing should be certificated. Citing the Los Angeles *Union Terminal* cases, the Court said, at 289 U.S. 84,

> "If the track is held to be an extension, that [state commission] order will not become effective unless the Missouri Pacific should secure a certificate from the Interstate Commerce Commission. Indeed, the prior determination by the state commission of the place, manner, and terms of the crossing may, by making the plan more concrete and definitive, aid the federal commission in reaching an informed judgment on the application. Compare Los Angeles Passenger Terminal Cases, 100 Inters. Com. Rep. 421, 459."

Finally, *Powell v. United States*, 300 U.S. 276 (1937) was concerned with the proper distribution of federal

jurisdiction. The Court held that the legal question of whether an extension was merely a spur track (which would eliminate all federal jurisdiction) should be determined by a conventional federal district court in a §1(20) proceeding, and could not be determined either by the Interstate Commerce Commission or by a three-judge district court reviewing an order of the Interstate Commerce Commission.

To summarize, §1(20) does not explicitly or implicitly state that it provides the exclusive remedy for illegal abandonment. In the absence of such a statement, and in the absence of any statement to that effect in any related statute, and in the absence of any decision holding that §1(20) is an exclusive remedy to terminate an illegal abandonment after the Interstate Commerce Commission has acted, the question presented is whether exclusivity is required by any federal interest. The answer is just to the contrary. The Interstate Commerce Commission has acted, thus protecting the federal interest. Since federal district court supervision of the repair work and of the nature of service to be rendered through the tunnel would involve the court in supervisory regulation of a kind far more appropriately handled by an administrative agency, the action which the PUC took should be sustained. Such action clearly fell within its regulatory jurisdiction, was in aid of the ICC's decision, and was not in contravention of any Congressional intent to limit jurisdiction to a federal court. The rationale of the *Union Terminal* cases should be controlling.

2. ALLEGED STORM DAMAGE IS NOT A PROPER ISSUE

As noted in the Statement, *supra,* the question of storm damage is not properly before the Court, since the question was not raised before the California Commission, nor before the California Supreme Court until after that Court's decision.

Moreover, the alleged storm damage does not present a federal question. Appellant correctly states that the question could not be presented to the California Supreme Court because of Section 1757 of the California Public Utilities Code providing that the State Supreme Court must hear the case on the record as certified by the PUC (Jurisdictional Statement, page 13). Appellant does not challenge the validity of that statute; therefore, no federal question is presented.

However, appellant contends that this Court should remand the matter to the California Public Utilities Commission with instructions to consider the question of storm damage, on the ground that the repair costs have so affected the financial position of appellant (a wholly owned subsidiary of the Southern Pacific Company) that the confiscation issue, determined against appellant in the earlier litigation, *Northwestern Pacific Railroad Company v. United States,* 228 F.Supp. 690 (1964), *affirmed* 379 U.S. 132 (1964), may now be reexamined.

No federal question is raised by this line of argument, despite appellant's use of the talismanic phrases "undue burden" and "confiscation". PUC's failure to consider the storm damage cannot raise a federal question, where appellant has not requested the PUC to do so. The opportunity to make such request has been open ever since

the storm damage occurred, and is still open today. Section 1708 of the California Public Utilities Code provides:

> "The Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. • • • "

Under this section, the PUC may reopen proceedings at the request of a utility long after final decision. *Edward T. Molitor,* 64 Cal. PUC 109, 110 (1965).

Therefore, appellant has failed to exhaust its administrative remedies.

Finally, the Interstate Commerce Commission, not the California Public Utilities Commission, is the proper forum in which to determine whether, because of alleged storm damage, there is now "confiscation" or a burden on interstate commerce unless the railroad line is abandoned. If the PUC were to engage in balancing appellant's ability to pay against the public's need for service over the railroad line, it would be making a determination of public convenience and necessity, thus invading the area of federal jurisdiction which appellant so zealously seeks to protect.

---

3. THE ORDER OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION REQUIRING RESTORATION OF FORMER RAIL SERVICE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellant objects to that part of the PUC's order requiring that appellant restore the same quantity and quality of service as existed prior to the tunnel fire. Ap-

pellant contends that the PUC violated Section 761 of the California Public Utilities Code, in that it ordered appellant to perform a particular service without taking evidence at the hearing as to the need for such service.

There is no contention that the PUC is foreclosed by any federal statute or constitutional provision from ordering that particular intrastate services be rendered by a railroad. The constitutionality of Section 761 of the Public Utilities Code has not been drawn in question. In denying appellant's petition for writ of review, the California Supreme Court has necessarily ruled that all provisions of state law were complied with. A denial of petition for writ of review of an order of the PUC is a decision on the merits. *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-31, 268 P.2d 723, 728 (1954), *appeal dismissed,* 348 U.S. 859. It is a basic constitutional principle that the construction of state law is the exclusive responsibility of the state courts. *Speiser v. Randall,* 357 U.S. 513, 523 (1958); *Scripto v. Carson,* 362 U.S. 207, 210 (1960). Thus appellant cannot here complain that Section 761 was not complied with.

It is contended that the PUC should not have relied upon the findings of the Interstate Commerce Commission. Reliance by an administrative agency upon the facts found in another proceeding raises no substantial federal question. In *Republic Aviation Corp. v. National Labor Relations Board,* 324 U.S. 793 (1945), the Court approved a decision of the National Labor Relations Board in which the Board's finding of unfair labor practice was predicated entirely upon facts found in a previous Board decision. The Court has approved the taking of judicial

notice by courts not only of the decision of other courts, but even of the records of cases in other courts. See *National Fire Insurance Co. v. Thompson,* 281 U.S. 331, 336 (1930). In the instant case the presiding PUC commissioner properly ruled (Tr. 5) that the PUC would take official notice of the decisions of the Interstate Commerce Commission and Federal District Court. This was particularly appropriate since the PUC was acting to implement the order of the Interstate Commerce Commission, as sustained by the Federal District Court.

Appellant, however, contends that the Interstate Commerce Commission could not validly make any findings as to the need for a particular frequency of rail service. Again, this contention raises no federal question. Assuming, for purposes of argument, that the ICC's findings on the need for a specific quantity of rail service were invalid, because outside the scope of an abandonment proceeding, such does not affect the PUC's power to rely upon and adopt such findings. Reliance by an administrative agency on extra-record information does not *per se* raise any constitutional questions. In this case, it was proper for the PUC to take official notice of the ICC's findings because all of the parties before the PUC had been parties before the Interstate Commerce Commission, where the issue of need for service had been fully tried. Unquestionably, therefore, the information relied upon was reliable and appellant had had every opportunity to rebut the facts upon which the Interstate Commerce Commission had relied.

In any event, we do not concede that the Interstate Commerce Commission could not make a valid finding

as to the quantity and quality of service required. That finding was an essential basic finding to support the ultimate finding by the Interstate Commerce Commission that the public convenience and necessity required that the line not be abandoned. Since the tunnel fire, the communities and shippers in southern Marin County have received a substitute, truncated twice-weekly rail service via car-ferry across San Francisco Bay. Obviously, the Interstate Commerce Commission could not have denied a certificate authorizing abandonment *if it had not found*, as a subsidiary fact, that the substitute rail service was inadequate and that the former daily service, through the tunnel, was needed by the shipping public.

If appellant sincerely believes that the quality and quantity of rail service to be furnished once the tunnel is repaired should be reexamined, there will be ample opportunity for appellant to seek such reexamination. Once the tunnel is repaired, the quality and quantity of service to be provided to southern Marin County can be reexamined in light of actual operating conditions. It is premature to raise that issue now, quite aside from the fact that it raises no federal issue.

---

4. PROCEEDINGS IN INTERSTATE COMMERCE COMMISSION FINANCE DOCKET NO. 23249 ARE NOT MATERIAL TO THIS APPEAL

While this Court was deliberating appellant's previous appeal from the order of the Interstate Commerce Commission in Finance Docket No. 21725, and shortly before the PUC issued its order, appellant filed a new applica-

tion seeking abandonment of the same line of railroad involved in Finance Docket No. 21725. Appellant now argues that no order to repair the tunnel should be permitted to go into effect until the Interstate Commerce Commision has acted in the new application. Thus, appellant has commenced an entirely new round of litigation designed, by the mere allegation of changed circumstances, to delay indefinitely the repair of the tunnel which has now blocked its main line for almost 4½ years.

Appellant, of course, has the right to be heard before the Interstate Commerce Commission if that Commission determines that the allegations of changed circumstances are anything but frivolous. However, such right to be heard cannot include the right to an indefinite continuation of the *de facto* abandonment. Under Section 1(20) of the Interstate Commerce Act, an abandonment without authorization from the Interstate Commerce Commission is not only unlawful, but subjects the officers of the carrier to criminal penalties. Recognizing, however, that natural catastrophes may result in the blocking of a railroad line, which the railroad wishes to abandon, and that it would be burdensome to require immediate repairs pending the conclusion of an abandonment proceeding, the Interstate Commerce Commission has not required immediate repair if prompt application for authorization to abandon is made. Likewise, the federal district courts have declined to issue orders requiring immediate repair under such circumstances. *Myers v. Arkansas & Ozarks Railway Corp.*, 185 F.Supp. 36 (W.D.Ark. 1960).

However, the extension of interim relief to a railroad, desirable as it may be during the pendency of an aban-

donment application before the Interstate Commerce Commission, cannot be permitted to extend over long periods of time by virtue of repeated applications for abandonment alleging changed conditions. Any such policy would result in complete destruction of the public protection accorded by Sections 1(18)-1(21) of the Interstate Commerce Act.

In the instant case, appellant was accorded every opportunity in the initial abandonment proceeding to prove its case. The tunnel remained blocked while appellant appealed to a three-judge district court and then to this Court. Appellant's privilege to litigate this matter on repeated occasions should not affect its responsibility to place the line back in service after final decision of this Court on the original abandonment application.

---

5. THE PUBLIC UTILITIES COMMISSION HAD NO OBLIGATION TO STAY ITS HAND SIMPLY BECAUSE THE NWP HAD FILED A NEW APPLICATION TO ABANDON

Appellant's fifth point (Jurisdictional Statement, page 17) cites no federal statute, constitutional provision, or decision raising a federal question by virtue of the PUC's refusal to receive new evidence to support its order to repair the tunnel. The decision cited by appellant (which was the final decision of this Court on the Los Angeles Union Terminal situation), while making a reference to the evidence which was adduced before the California Railroad Commission in that case, does not support the proposition that a proper order of the PUC cannot be based upon findings made by the Interstate Commerce

Commission. The rule stated in that case, *Atchison T. & S.F.Ry. v. Railroad Commission,* 283 U.S. 380, 396 (1931), is that the test of state regulation of railroads is "whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one."

The regulation by the PUC in the instant case is reasonable. The Interstate Commerce Commission had ruled that the public convenience and necessity would not permit the abandonment of the railroad line. Such ruling was based, in part, upon the demonstrated need of local shippers and communities for daily rail service. The Interstate Commerce Commission, however, did not order the repair of the tunnel since it does not have authority to order the construction or repair of facilities. This explains why the California Commission, rather than the Interstate Commerce Commission acted as it did in this case and why it acted as it did in the Los Angeles *Union Terminal* matter. There was nothing unreasonable or arbitrary in the PUC's decision to rely upon the evidence of need which had been adduced before the Interstate Commerce Commission rather than reopening the same question in a new hearing.

---

6. WHETHER THE FINDINGS OF THE INTERSTATE COMMERCE COMMISSION ARE RES JUDICATA IS IMMATERIAL

Appellant argues that the orders and findings of the Interstate Commerce Commission are not *res judicata.* Assuming that the findings of the Interstate Commerce Commission in Finance Docket No. 21725 were not *res judicata,* they could still be relied upon by the PUC as an

adequate basis for its order to repair the tunnel and restore the former rail service. Once the Interstate Commerce Commission had acted, and its order became final on appeal, the question of abandonment could not be relitigated or redetermined by the California Public Utilities Commission. There was no question remaining whether there could be an abandonment of the line. There was no question remaining whether public need required restoration of the line to operating condition. It would have been senseless to relitigate that issue, and furthermore, it would have been an abrogation of the Interstate Commerce Commission's exclusive jurisdiction to determine whether a railroad line may be abandoned. Whether the Interstate Commerce Commission's findings were *res judicata,* as that term is normally used, is therefore of no consequence.

CONCLUSION

Only two federal questions could possibly be raised by the PUC's order requiring appellant to repair the tunnel and restore former rail service.

The first such question would be whether such order imposed an undue burden upon Interstate Commerce. The Interstate Commerce Commission held that restoration of the line in question would not unduly burden interstate commerce, and that Commission's findings and decision have been upheld by this Court. The cost of repairing the tunnel was litigated at great length before the Interstate Commerce Commission, and was fully considered in arriving at its conclusion. Therefore, an order of the California Commission requiring appellant to do exactly what the Interstate Commerce Commission contemplated appellant must do, cannot be an undue burden upon interstate commerce.

The second federal question would be whether the PUC's order deprived appellant of its property without due process of law. Put another way, was this act of state regulation reasonable? There is no substantial question as to the reasonableness of the PUC's order. It was manifestly reasonable to require appellant to do that very thing which was contemplated by the Interstate Commerce Commission in denying authority to abandon the line. Procedurally, it was fair and reasonable to rely upon the findings as to public need for the former rail service made by the Interstate Commerce Commission. Moreover, it was necessary in order to avoid relitigating the question of public convenience and necessity which is

the exclusive domain of the Interstate Commerce Commission.

State regulation which is reasonable and which does not invade the preempted fields of federal jurisdiction, offends neither the due process clause of the Fourteenth Amendment nor the commerce clause.

We respectfully submit that the decisions of the Public Utilities Commission of the State of California and of the Supreme Court of the State of California are plainly correct, that appellant has presented no substantial question for the decision of this Court, and that the judgment of the Supreme Court of the State of California should be affirmed.

BORIS H. LAKUSTA

Attorney for Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California, County of Marin, California, Marin County Development Association, Camgros Gravel & Fuel Co., Inc., Chris Craft Sales of San Rafael, Colonial Wax Products Corporation of California, Golden Gate Distributing Co., Henry Hess Co., California Newspapers, Inc., McPhail Fuel Co., P.B.M. Inc., Rice Supply, Inc., A. G. Schoonmaker Co., Service Lumber Co., and Shamrock Materials, Inc., Appellees

GRAHAM JAMES & ROLPH
E. MYRON BULL, JR.
Of Counsel

Date: November 12, 1965

Certificate of Service

I, Boris H. Lakusta, attorney for the City of San Rafael, California, et al., appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, 1965, I served copies of the foregoing Motion to Affirm on the several parties hereto, as follows:

1. On the Northwestern Pacific Railroad Company, *appellant,* by mailing a copy, in a duly addressed envelope with air mail postage prepaid, to Randolph Karr, Esq., its attorney, Pacific Electric Building, 610 South Main Street, Los Angeles, California 90014.

2. On the Public Utilities Commission of the State of California, *appellee,* by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Mary Moran Pajalich, and Hector Anninos, its attorneys, 5072 State Building, San Francisco, California 94102.

Boris H. Lakusta

BLANK PAGE

BLANK
PAGE

BLANK PAGE

SUBJECT INDEX

	Page
Statement	1
The exclusive jurisdiction of the District Court	2
The disastrous Christmas Week 1964 flood that occurred after the matter was on appeal	3
The erroneous order requiring service based on no evidence	3
The record	5
Conclusion	6

TABLE OF AUTHORITES CITED

Cases	Page
Interstate Commerce Commission v. Louisville & NRR, 227 U.S. 88	5
Morgan v. United States, 298 U.S. 468	5
Northern Pacific Ry. v. Department of Public Works, 268 U.S. 39	5
Powell v. United States, 300 U.S. 276	2
St. Louis, etc. R. Co. v. Public Util. Comm'n., 279 U.S. 560	4
Statutes	
Act of June 25, 1948, ch. 646, 62 Stat. 931	2
Interstate Commerce Act, Sec. 1(20)	2
United States Code, Title 28, Sec. 1336	2
United States Code, Title 49, Sec. 1(20)	2
United States Constitution, Fourteenth Amendment	4
Textbooks	
4 American Jurisprudence 2d, Sec. 352, pp. 830-832	3
3 California Jurisprudence 2d, Secs. 190-191, pp. 677-681	3

IN THE

Supreme Court of the United States

October Term, 1965
No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal From the Supreme Court of the State of California.

Appellant's Brief in Opposition to Motions to Dismiss or Affirm.

Statement.

This Response is directed to the Motions to Dismiss or Affirm of the Public Utilities Commission of California,[1] and the City of San Rafael, *et al.*

Appellant does not agree with the repeated statements of appellees that the abandonment of the tunnel was motivated and resulted in gain to the appellant's parent Southern Pacific Company. Although this was

[1]The Public Utilities Commission of the State of California is hereafter referred to as California Commission.

the inference and statement of the Interstate Commerce Commission's decision (320 I.C.C. 19), when the matter was presented to a three-judge court, that court specifically refrained from making or approving any such inference or finding (228 F. Supp. 690, 694, 695 (1964), and even said:

> "The question is actually one of degree of profits as opposed to over-all net loss. . . ."

The above cited case, of course, was decided (April 17, 1964) before the disastrous Christmas Week 1964 flood.

The Exclusive Jurisdiction of the District Court.

Appellees argue that the language of Section 1(20) of the Interstate Commerce Act (49 U.S.C. Sec. 1(20)) that "any abandonment contrary to the provisions of this paragraph . . . may be enjoined by any court of competent jurisdiction" does not mean the district court jurisdiction is exclusive. However, what is involved is that the California Commission is attempting to supplement and enforce an order of the Interstate Commerce Commission (that refused to allow or permit abandonment) and exclusive jurisdiction "to enforce" as well as "enjoin" orders of the Interstate Commerce Commission has been placed in the District Court[2] (28 U.S.C. 1336). A careful reading of *Powell v. United States,* 300 U.S. 276, 287-8 (1937) supports this "sole remedy" construction.

---

[2]"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." June 25, 1948, c. 646. 62 Stat. 931.

The Disastrous Christmas Week 1964 Flood That Occurred After the Matter Was on Appeal.

Appellees argue that the matter of the disastrous 1964 Christmas Week flood damage to appellant should have first been presented to the California Public Utilities Commission.

The California Commission's decision denying a rehearing was dated October 13, 1964, and a Petition for a Writ of Review was filed with the California Supreme Court on October 29, 1964. All of this occurred long before the Christmas Week 1964 flood.

The general rule is that upon perfecting an appeal, the lower tribunal is divested of jurisdiction of the cause. *3 Calif. Jur. 2d, Appeal and Error, Secs.* 190-191 (pp. 677-681). *4 Am. Jur. 2d, Appeal and Error,* Sec. 352 (pp. 830-832). Thus, the California Commission could not have acted on the matter. In any event, as seen from the response of the California Commission in the Supreme Court of the State of California and here, such would have been a useless act.

The Erroneous Order Requiring Service Based on No Evidence.

The appellees argue that federal questions were not involved in the service matter, but apparently they overlooked both the notices of appeal and the specific language of the second full paragraph of page 8 of the Jurisdictional Statement wherein there was set forth the federal questions in detail, to which reference is made.

What occurred, of course, was that the Presiding Commissioner of the California Commission refused to allow any evidence to be presented on this subject of service [Tr. 21-23], and refused to allow appellant to

show or prove that the service in existence at the time of the tunnel fire was not needed or required [Tr. 21-23, 27, 28, 39-42, 44-45, 45-47, 55]. This improper limiting of the issues [Tr. 18-19, 27] was not only prejudicial error, but resulted in the fact there is no evidence to support the findings, conclusions and orders of the California Commission. The violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and other federal grounds have been appropriately raised.

The appellees argue that appellant should put the former service back on and then see if it is needed. This is no solution, for does this appellant have to waste its funds in performing unneeded service and suffer administrative delay, when it was refused an opportunity to introduce evidence on the subject of service?

The action of the California Commission was directly contrary to the holding of this Court in *St. Louis, etc. R. Co. v. Public Util. Comm'n.*, 279 U.S. 560, 563 (1929) wherein it was said:

> "The past failure of the railway to apply for leave to discontinue the service does not, however, justify exposing it, and its officers and employees, to the severe penalties prescribed by the statute. It may be that, upon full presentation of the facts, the commission would find that to continue the service would subject the carrier to an unreasonable burden; or the carrier may suggest some satisfactory substitute for the specific service now demanded of it. The commission should give to the

railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the commission without subjecting the railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare Lawrence v. St. Louis-San Francisco R. Co. 278 U. S. 228, ante, 282, 49 Sup. Ct. Rep. 106."

Also, appellant has been denied a hearing on this subject when all evidence was refused and rejected. *Morgan v. United States,* 298 U.S. 468, 480-481 (1936). *Interstate Commerce Commission v. Louisville & NRR,* 227 U.S. 88, 91-92 (1913). *Northern Pacific Ry. v. Department of Public Works,* U.S. 39, 44-45 (1925).

The Record.

On page 23 of the Jurisdictional Statement the following motion to require the California Public Utilities Commission to bring up the portion of the record in its entirety appears:

"If the Supreme Court of the State of California denies the Petition for Rehearing or declines to issue a Writ of Mandate, or does not act on the matter within a reasonable length of time, it is respectfully requested that this Court require and direct the appellee to certify for transmission to this Court the portions of the record in its custody specified in the Notice of Appeal and as required by the Revised Rules of the Supreme Court of the United States (*Re Summers,* 325 U.S. 561, 563 (1945))."

On October 13, 1965, the Supreme Court of the State of California denied (without opinion) the Petition for Rehearing (and declined to issue a Writ of Mandate). Therefore, the above motion is respectfully renewed for the grounds set forth under the subject heading "The Record" in the Jurisdictional Statement.

Conclusion.

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

THORMUND A. MILLER,
JEREMIAH C. WATERMAN,
RANDOLPH KARR,
By RANDOLPH KARR,
Attorneys for Appellant.

END